A

PP

v.

AZMAN ISMAIL & ANOTHER CASE

B

HIGH COURT MALAYA, IPOH
VT SINGHAM J
[CRIMINAL TRIALS NOS: 45-16-04 & 45-17-04]
24 JANUARY 2007

C

CRIMINAL LAW: *Penal Code - Sections 302, 34 - Murder - Common intention - Whether proved - Circumstantial evidence - Pre-arranged plan must be established either by direct evidence or inferred from surrounding circumstances - Criminal act must have been done in furtherance of common intention - Common intention to be inferred only if it is necessarily deducible from circumstances - Whether common intention proven*

D

CRIMINAL PROCEDURE: *Prosecution - Close of prosecution - Prima facie case - Sufficiency of proof - No evidence that accused caused deceased's death - Statements made by prosecution in Opening Case not established - Whether there was evidence accused assaulted deceased - Circumstantial*

E

evidence relied on by prosecution insufficient - Two possible views - View or inference favorable to accused to be adopted - Whether prosecution failed to prove prima facie case - Whether accused guilty of murder - Penal Code, s. 302

CRIMINAL PROCEDURE: *Charge - Fresh charge, addition of - Whether*

F

sufficient materials before court to justify addition of fresh charge - Section 158 Criminal Procedure Code - Power of court to alter or add to charge at anytime before pronouncement of judgment - Discretionary power to be exercised judicially - Procedure under s. 158 cannot be varied - Prosecution's application to add fresh charge unaccompanied with any material or authority

G

- Prosecution had materials or information regarding additional proposed charge right from beginning of trial - Lack of diligence and expedition on prosecution's part to add additional charge - Gross injustice and oppressive to accused - Would occasion miscarriage of justice - Application to add new charge of an offence under s. 365 of the Penal Code not allowed

H

EVIDENCE: *Expert evidence - Qualifications of expert - Evidence of forensic DNA scientist wanting, unreliable and unsafe - Prosecution failed to prove expertise as required by law*

EVIDENCE: *Documentary evidence - Computer generated documents -*

I

DNA analysis - Probabilities values obtained using computer - Compliance with s. 90A of the Evidence Act 1950 - Acceptance of information given by computer software and print out - No evidence of such compliance - Whether evidence admissible

EVIDENCE: *Adverse inference - Whether presumption arose - Murder charge - Main culprit still at large - No evidence adduced by prosecution regarding steps or action taken to trace main culprit - Whether s. 114(g) of the Evidence Act 1950 to be applied*

The five accused persons here were charged with the offence of murder under s. 302 of the Penal Code read with s. 34 of the same Code. At the outset of the trial, the learned DPP tendered to the court and read out a typed-written 'Opening Case' of the prosecution case. At the end of the prosecution's case (after 38 witnesses), the defence team had successfully disclosed through cross examination that one Tok Mat Crane was the main culprit. Being unable to produce Tok Mat Crane as a witness, the prosecution tendered an amended charge for an offence under s. 365 of the Penal Code (kidnapping/abduction) against all the five accused persons including Mohd Nizam bin Ariffin (Tok Mat Crane) as the person who was still at large. It was obvious from the investigation and the outset of the trial that it was Mohd Nizam bin Ariffin who was at large. The defence objected to the said application to tender the additional charge on the grounds *inter alia* that it was prejudicial to the accused persons. On the issue whether the accused persons had been identified as the assailants of the deceased, the prosecution had introduced DNA profile.

Held (acquitting and discharging all the five accused persons without calling for their defence):

(1) The prosecution did not produce any evidence that the deceased was intentionally hit, punched, kicked and stamped on the date, time and place as stated in the charge and which had caused the death of the deceased. On this core alone all the five accused persons should be acquitted without any hesitation. (para 22)

(2) The Opening Case of the prosecution had infact misled the court and obviously the accused persons as none of the statement made in the said Opening Case had been established by the prosecution except that the deceased had died. There was obvious discrepancy between the Opening Case for the prosecution and the evidence which was adduced on behalf of the prosecution at the trial. (para 29)

(3) In relation to the proposed new charge, the court must consider if there were sufficient materials before the court in the evidence produced during the trial to justify the exercise of its discretion. Section 158 of the CPC expressly and clearly gives the power to the court to alter or add to the charge at anytime before the

pronouncement of judgment. However, this discretionary power must be exercised judicially. The procedure expressly regulated by s. 158 cannot be varied by consent or be waived. The application of the learned DPP was unaccompanied with any material or authority. Justice of the case demanded that the application of the learned DPP to include the additional charge of abduction ought to be rejected outright. This was not a case where the additional proposed charge by the prosecution came to light only after the trial had commenced or after it had considered the totality of the evidence at the trial as the prosecution had the materials or information right from the beginning of the trial or during investigation stage itself of a possible offence of abduction. (paras 30, 31 & 32)

(4) There was lack of diligence and expedition on the part of the prosecution to bring the additional charge to trial as quickly and as reasonably and fairly as possible. It was a gross injustice and oppressive to the accused persons to grant the application of the prosecution at this stage of the proceedings as it would prejudice the accused persons and occasion a miscarriage of justice. Accordingly, the application to add another charge of an offence under s. 365 of the Penal Code was not allowed.
(paras 34, 42 & 43)

(5) The evidence of the forensic DNA scientist (PW8) was most wanting, unreliable and unsafe to accept. The prosecution had failed to prove the expertise of PW8 by introducing evidence as required by law. Further, the DNA analysis and the probabilities values were **obtained using the computer**. In order to accept the information given by the **computer software** and the print out, there must be compliance with s. 90A of the Evidence Act 1950. There was no evidence of such compliance of the condition precedent as required by s. 90A. (paras 47, 48, 49 & 50)

(6) There was no evidence adduced what positive steps or action had been taken to trace Tok Mat Crane other than to include him as the person who was at large in the charge to escape the application of s. 114(g) of the Evidence Act 1950. (para 78)

(7) In order to invoke s. 34 of the Penal Code against the accused persons, concert pursuant to a pre-arranged plan has to be established either by direct evidence or by inference from surrounding circumstances and the criminal act complained of must have been done by one of the accused persons in the furtherance of the common intention of them all. There must be sufficient

materials from which it can be inferred and the inference of common intention shall never be reached unless it is a necessary inference deducible from the circumstances of the case. In the instant case, s. 34 did not assist the prosecution to establish the charge against the five accused persons. (paras 79 & 82)

(8) The circumstantial evidence relied on by the prosecution was insufficient to meet the requirement in law to find a *prima facie* case against the five accused persons. If there are two possible views of the evidence adduced in a case, the view or inference which is favorable to the accused should be adopted especially in cases where the guilt of the accused is sought to be established by circumstantial evidence. (paras 87 & 95)

(9) The prosecution had failed miserably to establish a *prima facie* case against all the five accused. (para 106)

Case(s) referred to:
Abdullah Saad v. PP [1956] 22 MLJ 92 ***(refd)***
Abdullah Zawawi v. PP [1985] 2 MLJ 16 ***(refd)***
Alan James Doheny Gary Adams [1997] 1 Cr App R 369 ***(refd)***
Attorney General v. Times Newspaper Ltd [1973] 3 All ER 54 ***(refd)***
Badri v. State of Rajasthan AIR 1976 SC 560 ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Balbeer Singh Johal v. Gurmit Kelsora Ram [1972] Cr Apeeal 348 ***(refd)***
Bashir v. State AIR [1953] All 668 ***(refd)***
Bloomfield [1997] 1 Cr App R 135 ***(refd)***
Bollivaram Pedda Narsireddy v. State of AP [1991] Cr LJ 1833 (AC) ***(refd)***
Chandmal & Another v. State of Rajasthan AIR [1976] SC 917 ***(refd)***
Chandrasekaran & Ors v. PP [1971] 1 MLJ 153 ***(refd)***
Chandu v. State of Madhya Pradesh AIR [1992] SC 2302 ***(refd)***
Chang Kim Siong v. PP [1968] 1 MLJ 36 ***(refd)***
Cheng Seng Heng & Ors v. PP [1949] MLJ 175 ***(refd)***
Chew Cheng Lye v. Regina [1956] MLJ 240 ***(refd)***
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***
Dato Mokhtar Hashim & Anor v. PP [1983] 2 MLJ 232 ***(refd)***
Denis Adams [1996] 2 Cr App R 467 ***(refd)***
Devilal v. The State of Rajasthan AIR [1971] SC 1444 ***(refd)***
DP Vijandran v. PP [1999] 1 CLJ 691 CA ***(refd)***
Dr DC Saxena v. Honorable Chief Justice of India [1996] 5 SCC 216 ***(refd)***
Eng Sin v. PP [1974] 2 MLJ 168 ***(refd)***
Franklin v. Minister of Town and Country Planning [1948] AC 87 ***(refd)***
Gambhir v. State of Maharashtra AIR [1982] SC 1157 ***(refd)***
Gnansegaran Pararajasingam v. PP [1997] 4 CLJ 6 CA ***(refd)***
Hanafi Mat Hassan v. PP [2006] 3 CLJ 269 CA ***(refd)***
Harcharan Singh v. PP [2005] 1 CLJ 11 CA ***(refd)***
Harden [1962] 46 Cri Appeal Report 90 ***(refd)***
Harendar Narain Singh v. State of Bihar AIR [1991] SC 1842 ***(refd)***
Hari Om v. State of UP [1993] Cr LJ 1383 ***(refd)***

A *Hashim & Anor v. PP [1956] MLJ 233* ***(refd)***
Idris v. PP [1960] 26 MLJ 296 ***(refd)***
In Re Johal and Ram [1972] 56 Cr App 348 ***(refd)***
Inderjit Singh v. State of Punjab AIR [1991] SC 1674 ***(refd)***
Isa Che Noh v. PP [1956] MLJ 93 ***(refd)***
Jaharlal Das v. State of Orissa AIR [1991] SC 1388 ***(refd)***
B *Jayaraman & Ors v. PP [1979] 2 MLJ 88* ***(refd)***
Jayaraman & Ors. v. PP [1982] 2 MLJ 273 ***(refd)***
Jogineder Singh v. State of Harnya AIR [1994] SC 461 ***(refd)***
Jose v. State of Kerala AIR [1973] SC 944 ***(refd)***
Jubri v. PP [1962] 28 MLJ 34 ***(refd)***
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C *Kali Ram v. State Of HP AIR [1973] SC 2773* ***(refd)***
Kumaraguru & Ors v. PP [1994] 1 MLJ 254 ***(refd)***
Kamaruzaman Mat Hassan & Ors v. PP [1997] 5 CLJ 279 HC ***(refd)***
Kamis v. PP [1975] 1 MLJ 46 ***(refd)***
Kansa Behera v. State of Orissa AIR [1987] SC 1507 ***(refd)***
D *Kantilal Chandulal Metha v. State of Maharashtra AIR [1970] SC 359* ***(refd)***
Karam Singh v. PP [1967] 2 MLJ 25 ***(refd)***
Kartar Singh & Anor v. Rex [1952] 18 MLJ 85 ***(refd)***
Kerpal v. State of Utar Pradesh AIR [1954] SC 706 ***(refd)***
Khalid Panjang & Ors v. PP [1964] MLJ 67 ***(refd)***
Khoo Hi Chiang v. PP [1994] 2 CLJ 151 SC ***(refd)***
E *Khoon Chye Hin v. PP [1961] MLJ 105* ***(refd)***
Kishore Chand v. State of HP [1991] SCJ (CR) 86 ***(refd)***
Krishna Govind Patel v. State of Maharashtra AIR [1963] SC 1413 ***(refd)***
Lavji Mona v. State Of Gujarat CRI LJ 3148 ***(refd)***
Lee Ah Cheong v. Regina [1959] MLJ 242 ***(refd)***
Lee Yoon Choy & Ors v. PP [1949] MLJ 66 ***(refd)***
F *Lew Cheok Hin v. R [1956] MLJ 131* ***(refd)***
Lim Foo Yong v. PP [1976] 2 MLJ 259 ***(refd)***
Long Samat & Ors v. PP [1974] 2 MLJ 152 ***(refd)***
Lonsdale Nathaniel [1995] 2 CR App R 565 ***(refd)***
Looi Kow Chai v. PP [2003] 1 CLJ 734 CA ***(refd)***
Luke Anthony Piggot v. Jefrrey Simon Lippin [1999] 2 Cr Appeal ***(refd)***
G *Mahbub Shah v. King-Emperor [1945] 1A Vol LXXII 148* ***(refd)***
Mahla Singh v. Emperor AIR [1931] Lah 380 ***(refd)***
Makunda v. State of Orissa [1983] Cr LJ 1025 (Ori) ***(refd)***
Mehtab Singh v. State of MP AIR [1975] SC 274 ***(refd)***
Micheal Gordon [1995] 1 Cr App R 290 ***(refd)***
Mohd Din v. PP [1985] 2 MLJ 251 ***(refd)***
H *Mohd Yazri Minhat v. PP [2003] 2 CLJ 65 CA* ***(refd)***
Moti Gundani v. State of Orissa [1981] Cri LJ 2342 ***(refd)***
Muhamad Safarudin Baba v. PP [2002] 4 CLJ 210 CA ***(refd)***
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Namasiyiam & Ors v. PP [1987] 2 MLJ 336 ***(refd)***
I *Nand Lal Misra v. Kanhaiya Lal Misra AIR [1960] SC 882* ***(refd)***
Nanhu Mahton v. Emperor AIR Patna 338 ***(refd)***
Naresh Kumar v. State of Maharashtra AIR [1980] SC 1160 ***(refd)***

Ng Hoong Kee v. PP [1967] 1 MLJ 85 ***(refd)***
Palvinder kaur v. State [1952] SC 354 ***(refd)***
Pandurang v. State of Hyderabad AIR [1955] SC 216 ***(refd)***
Percival Leonard Taylor, James Weaver and George Thomas Donovan [1928] Cr App R 20 ***(refd)***
Phoon Liat Sum v. PP [1950] MLJ 205 ***(refd)***
Pie Chin v. PP [1985] 1 MLJ 234 ***(refd)***
PP v. Ayyavoo Subramaniam & Ors [2004] 6 MLJ 511 ***(refd)***
PP v. Chia Leong Foo [2000] 6 MLJ 705 ***(refd)***
PP v. Fancis Dang Nuya [1988] 1 MLJ 89 ***(refd)***
PP v. Gurdial Singh Get Singh [2005] 6 CLJ 272 HC ***(refd)***
PP v. Heng You Nang [1949] MLJ 285 ***(refd)***
PP v. Jeorge Enrique Tellon [1998] 4 CLJ 278 CA ***(refd)***
PP v. Kang Choo Heng & Anor [1991] 3 CLJ 2574; [1991] 3 CLJ (Rep) 545 HC ***(refd)***
PP v. Lai Pong Yuen & Ors [1968] 1 MLJ 12 ***(refd)***
PP v. Lee Beng Siang [1991] 3 CLJ 2927; [1991] 3 CLJ (Rep) 584 ***(refd)***
PP v. Lin Lien Chen [1990] 2 CLJ 1020; [1990] 2 CLJ (Rep)746 HC ***(refd)***
PP v. Loo Seng Yip [2005] 1 AMR 647 ***(refd)***
PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***
PP v. Mohd Ali Abang & Ors [1994] 2 MLJ 12 ***(refd)***
PP v. Mohd Amin Mohd Razali & Ors [2002] 5 CLJ 281 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Muhamad Nasir Shaharuddin & Anor [1992] 4 CLJ 2028; [1992] 3 CLJ (Rep) 408 HC ***(refd)***
PP v. Norfaizal [2004] 1 AMR 310 ***(refd)***
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Pritam Singh v. PP [1970] 2 MLJ 239 ***(refd)***
R v. Baskerville [1916] 2 KB 658 ***(refd)***
R v. Cheah Tow Peng [1952] 216 ***(refd)***
R v. Demaine; The Times Nov 20 1970 ***(refd)***
R v. Franco [2003] SASC 140 ***(refd)***
R v. George Maxwell (Developments) Ltd [1980] 2 All ER 99 ***(refd)***
R v. Grondkowski; R v. Mellinowski [1946] 1 KB 369 ***(refd)***
R v. Guram 62 Cr App R 242 ***(refd)***
R v. O' Conner [1997] CLR 516 ***(refd)***
R v. Serl & Ors [1971] Crim LR 592 ***(refd)***
R v. Shepperd [1993] 1 All ER 225 ***(refd)***
R v. Solomon [1980] Cr App R R 247 ***(refd)***
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Rajendra Singh Sethia v. The State & Anor [1989] Cri LJ 255 ***(refd)***
Rajikshore v. State AIR [1960] Cal 321 ***(refd)***

Ram Avtar v. The State (Delhi Administration) AIR [1985] SC 1692 ***(refd)***
Ram Jag v. State of Uttar Pradesh AIR [1974] SC 606 ***(refd)***
Re Bommareddi Sathiyarayana Reddi AIR (34) [1947] Madras 170 ***(refd)***
Rogayah Che Mat v. PP [2001] 5 MLJ 77 ***(refd)***
Sathiyanarayan v. State of MP AIR [1972] SC 1309 ***(refd)***
Schmidt Scientific Sdn Bhd v. Ong Han Suan [1998] 1 CLJ 685 HC ***(refd)***
Shahrom Ahmad v. PP [2000] 3 SLR 565 ***(refd)***
Shivaji Sahabrad Bobada v. State of Maharashtra AIR [1973] Cr LJ 1783 ***(refd)***
Sia Soon Suan v. PP [1966] 1 MLJ 116 ***(refd)***
Sitao Jholia v. Emperor AIR [1943] Nag 36 ***(refd)***
State of Haryana v. Ved Prakash AIR [1994] SC 468 ***(refd)***
State of Kerala v. NJ Samuel AIR [1961] Ker 99 ***(refd)***
State of Uttar Pradesh v. Mohammad Amin AIR [1964] SC 703 ***(refd)***
Stephen Cooke [1995] I Cr App R 318 ***(refd)***
Sunny Ang v. PP [1963] 2 MLJ 195 ***(refd)***
Tai Chai Keh v. PP [1948-1949] MLJ Supp 105 ***(refd)***
Tensely v. Painter [1969] Cri LR 139 ***(refd)***
Teoh Hoe Chye v. PP [1987] 1 MLJ 220 ***(refd)***
Thong Hong Kee v. PP [1952] 1 MLJ 110 ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***
Wong Chop Saow v. PP [1965] 1 MLJ 247 ***(refd)***
Wong Seak Fon v. PP [1972] 1 MLJ 203 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 158, 170, 179(1), 254
Evidence Act 1950, ss. 90A(1), (2), (4), 91, 92, 114(g)
Penal Code, ss. 34, 302, 365

Other source(s) referred to:
Mallal's Criminal Procedure, 5th edn, 1998, para 5954

For the PP - Datuk Abdul Rahman Putra Datuk Hj Taha (Mohd Dusuki Mokhtar, Ahmad Sazilee Abd Khairi & Muhamad Anas Mahadzir with him); DPPs
For the 1st accused - Tun Mohd Ammar Aziz; M/s Ammar Aziz & Co
For the 2nd accused - Christopher Fernando; M/s Aris Rizal Christopher Fernando
For the 3rd accused - Gurbachan Singh; M/s Bachan & Kartar
For the 4th accused - R Naidu; M/s Ng Choo Beng & Naidu
For the 5th accused - Christopher Fernando (Naran Singh & Iszam Kamal Ismail with him); M/s Aris Rizal Christopher Fernando; M/s Naran Singh & Co & M/s Iszam Kamal & Hazlan
Holding watching brief for the family of the deceased - R Jegatheesa; M/s RJ Esa & Co

Reported by Amutha Suppayah

JUDGMENT

VT Singham J:

[1] In this case, the five accused persons have been charged for the offence of murder of Mohd Hosni Fadzli bin Mohd Amin, deceased on 22 December 2003 between 3am and 8am at **Ikhwan Auto at No. 19, Hala Rapat Baru 20, Kawasan Perindustrian Ringan Kinta, Ipoh**, an offence punishable under s. 302 of the Penal Code and to be read with s. 34 of the same Code. (emphasis added)

[2] The original charge (encl. 7) against the first, second, third and fourth accused in Criminal Trial No. 45-17-04 reads as follows:

> Bahawa kamu bersama-sama dengan Azman bin Ismail **dan seorang lagi yang masih bebas** bagi mencapai niat bersama kamu semua pada 22 Disember 2003 di antara jam 3.00 pagi hingga 8.00 pagi di **Ikhwan Auto di No. 19, Hala Rapat Baru 20, Kawasan Perindustrian Ringan Kinta, Ipoh**, di dalam Daerah Kinta di dalam Negeri Perak Darul Ridzuan, telah melakukan pembunuhan dengan menyebabkan kematian ke atas Mohd Hosni Fadzli bin Mohd Amin, KPT: 820610-08-5333 dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Kesiksaan dan dibaca bersama seksyen 34 Kanun yang sama. (emphasis added).

[3] The original charge (encl. 8) against the fifth accused in criminal trial No. 45-16-04 reads as follows:

> Bahawa kamu bersama-sama dengan Mohd Hafiz bin Ibrahim, Mohd Shafiq Azren bin Mohd Salleh, Mohd Faizal bin Radzali, Mohamad Rizal bin Abu Hassan **dan seorang lagi yang masih bebas** bagi mencapai niat bersama kamu semua pada 22 Disember 2003 di antara jam 3.00 pagi hingga 8.00 pagi di **Ikhwan Auto di No. 19, Hala Rapat Baru 20, Kawasan Perindustrian Ringan Kinta, Ipoh**, di dalam Daerah Kinta, di dalam Negeri Perk Darul Ridzuan, telah melakukan pembunuhan dengan menyebabkan kematian keatas Mohd Hosni Fadzli bin Mohd Amin, KPT: 820610-08-5333 dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Kesiksaan dan dibaca bersama seksyen 34 Kanun yang sama. (emphasis added)

[4] The charge (encl. 7) was read and explained to the first, second, third and fourth accused separately whereby the charge (encl. 8) was read and explained to the fifth accused and they all pleaded not guilty.

A **Background Facts Of The Trial**

On 11 August 2004 when all the five accused persons were formally charged in this court after the legal formalities for the transmission of the cases from the magistrate's court, Ipoh to this court was completed; the learned deputy public prosecutor informed the court that the prosecution will be calling 30 witnesses. The learned deputy public prosecutor had also applied for a joint trial of criminal trial No. 45-17-04 involving the four accused persons with criminal trial No. 45-16-04 involving the fifth accused person as provided under s.170 of the Criminal Procedure Code (hereinafter referred to as "the CPC"). Counsels for all the five accused persons had no objection for the joint trial of both the cases. This court then allowed the application of the prosecution for the joint trial of both the cases and fixed the hearing to commence from 10 January 2005.

[5] On 11 January 2005 before the commencement of the hearing, learned counsel Mr. Christopher Fernando for the second accused with the consent of all the counsels for the other accused informed this court that he will lead the defence of all the accused persons. Learned counsel, Mr. Gurbachan Singh requested the accused Azman bin Ismail in Criminal Trial No. 45-16-04 be termed as the fifth accused and learned counsel for the fifth accused Mr. Naran Singh agreed. This court then allowed the said application.

[6] At the outset of the trial, learned DPP Datuk Abdul Rahman Putra tendered to the court and read out a typed written 'Opening Case' of the prosecution case and it was marked as encl. 15. The 'Opening Case' (encl. 15) was also read and explained to all the five accused persons in Bahasa Malaysia and they all understood the same. Section 179(1) of the CPC enables the prosecution to make an opening address by describing the nature of the offence framed against the accused person and by stating a brief summary of the evidence by which it proposes to prove the guilt of the accused person. (See *Richard* [1975] Cri. L.J 1256(C)). Section 179 of the CPC read as follows:

> 179. Opening case for prosecution.
>
> (1) The officer conducting the prosecution shall open his case by stating shortly the nature of the offence charged and the evidence by which he proposes to prove the guilt of the accused.
>
> (2) He shall then examine his witnesses, who may in turn be cross-examined for the defence and, if necessary, re-examined.

Opening Case Of The Prosecution

(1) Tertuduh yang bernama Azman bin Ismail bersama-sama dengan Mohd Hafiz bin Ibrahim, Mohd Shafiq Azren bin Mohd Salleh, Mohd Faizal bin Radzali, Mohd Rizal bin Abu Hassan dan **seorang lagi yang masih bebas** bagi mencapai niat bersama mereka telah dikenakan tuduhan di bawah Seksyen 302 Kanun Kesiksaan di mana pada 22 Disember 2003 **di antara jam 3.00 pagi hingga 10.00 pagi di Ikhwan Auto di No. 19, Hala Rapat Baru 20, Kawasan Perindustrian Ringan Kinta, Ipoh** di dalam Daerah Kinta, di dalam Negeri Perak Darul Ridzuan telah melakukan kesalahan membunuh iaitu telah menyebabkan kematian Mohd Hosni Fadzli bin Mohd Amin (KPT: 820610-08-5333) dengan itu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Kesiksaan dan dibaca bersama seksyen 34 Kanun yang sama. (emphasis added)

(2) Manakala di dalam satu lagi pertuduhan, tertuduh yang bernama Mohd Hafiz bin Ibrahim, Mohd Shafiq Azren bin Mohd Salleh, Mohd Faizal bin Radzali dan Mohd Rizal bin Abu Hassan bersama-sama dengan Tertuduh Azman bin Ismail dan **seorang lagi yang masih bebas** telah dituduh kerana melakukan kesalahan yang sama **pada masa dan tempat** yang tersebut dan dibaca bersama dengan seksyen 34 Kanun yang sama. (emphasis added)

(3) Kedua-dua pertuduhan telah diperintahkan untuk dijalankan perbicaraan secara bersama (joint-trial).

(4) Untuk membuktikan pertuduhan ini, pihak pendakwaan perlu membuktikan 3 intipati seperti berikut:

i. Tertuduh-tertuduh telah melakukan perbuatan yang menyebabkan kematian simati.

ii. Perbuatan itu dilakukan dengan niat untuk menyebabkan kecederaan pada tubuh badan simati.

iii. Kecederaan dilakukan adalah dengan sengaja dan kecederaan tersebut adalah mencukupi dalam keadaan biasa untuk menyebabkan kematian.

(5) Bagi membuktikan intipati-intipati ini, *pihak pendakwaan akan memanggil saksi-saksi yang melihat kejadian berlaku untuk membuktikan tertuduh-tertuduh dengan niat bersama telah sengaja memukul, menumbuk, menendang dan memijak simati pada tarikh, masa dan tempat seperti dalam pertuduhan*, iaitu di Ikhwan Auto. (emphasis added)

(6) Saksi-saksi yang melihat kejadian berlaku akan memberi keterangan bahawa mereka melihat tertuduh-tertuduh telah datang ke rumah simati dan memukul simati.

(7) Saksi-saksi akan memberi keterangan melihat tertuduh-tertuduh telah mengangkat simati dan menghumbankannya ke dalam sebuah kereta yang kemudiannya memecut keluar dari situ. Sebuah lagi kereta yang digunakan oleh tertuduh-tertuduh juga kelihatan memecut keluar dari situ.

(8) Keterangan akan membuktikan bahawa tertuduh-tertuduh telah memukul simati di dalam kereta semasa di bawa keluar dari rumah simati.

(9) Keterangan seterusnya akan membuktikan bahawa **simati telah dibawa oleh tertuduh-tertuduh ke sebuah bengkel iaitu Ikhwan Auto. Simati kemudiannya telah dipukul, ditumbuk, ditendang dan dipijak oleh tertuduh-tertuduh.** (emphasis added)

(10) **Keterangan melalui saksi-saksi akan membuktikan bahawa simati telah tidak sedarkan diri setelah berkali-kali dipukul, ditumbuk, ditendang dan dipijak oleh tertuduh-tertuduh.** (emphasis added)

(11) Seorang saksi iaitu bapa simati telah membuat laporan Polis setelah diberitahu bahawa anaknya itu telah dipukul dan diculik oleh tertuduh-tertuduh.

(12) **Saksi akan dipanggil untuk membuktikan simati meninggal dunia di tempat kejadian**. (emphasis addded)

(13) Keterangan akan dikemukakan bahawa simati telah dicamkan sebagai Mohd Hosni Fadzli bin Mohd Amin (KPT:820610-08-5333).

(14) Doktor yang menjalankan bedah siasat ke atas simati akan mengesahkan simati meninggal dunia akibat "tamponad jantung (jantung pecah) akibat dari trauma tumpul pada dada".

(15) **Keterangan akan dibuktikan bahawa pukulan, tumbukan, tendangan dan pijakan yang dilakukan oleh tertuduh-tertuduhlah yang menyebabkan kecederaan parah pada jantung simati.** (emphasis by this court)

(16) Keseluruhan keterangan daripada saksi-saksi pendakwaan bahawa tertuduh-tertuduh dengan niat bersama telah sengaja menyebabkan kecederaan pada tubuh badan simati yang mana kecederaan ini mencukupi dalam keadaan biasa untuk menyebabkan kematian.

(17) Keterangan melalui saksi-saksi pendakwaan akan membuktikan tertuduh-tertuduh telah melakukan pembunuhan ke atas simati.

[7] On 19 September 2005 after 36 witnesses have testified and after the defence team had successfully disclosed through cross examination that Tok Mat Crane was the main culprit who had acted as the director of operation of the entire episode and the prosecution being unable to produce Tok Mat Crane as a witness to testify for the prosecution, the learned DPP conveniently tendered an amended charge against all the five accused persons and included Mohd Nizam bin Ariffin as the person who is still at large in both the amended charges (ie, encls. 40 and 41) although it was obvious from the investigation and the outset of the trial that it was Mohd Nizam bin Ariffin who is known as 'Tok Mat Crane' who was at large. The prosecution made a tactical move to name Mohd Nizam bin Ariffin who is known as Tok Mat Crane as the person who is at large in the amended charges probably to escape the application of s. 114(g) of the Evidence Act 1950 against them as he was not called as a witness for the prosecution or offered to the defence. In fact, the original charges (encls. 7 and 8) itself contained "unnamed person" who was at large and the prosecution did not name who was that person although it was clear that it was Mohd Nizam bin Ariffin who was known as 'Tok Mat Crane' and this is confirmed by the Chief Investigating Officer (PW38) when he said "saya tahu siapa itu suspek yang masih bebas, iaitu Tok Mat Crane".

[8] The amended charge (encl. 40) against the first to the fourth accused persons in criminal trial No. 45-17-04 reads as follows:

> Bahawa kamu bersama-sama dengan Azman bin Ismail **dan seorang lagi bernama Mohd Nizam bin Ariffin yang masih bebas** bagi mencapai niat bersama kamu semua pada 22 Disember 2003 **diantara jam 3.00 pagi hingga 8.00 pagi di Ikhwan Auto di No. 19, Hala Rapat Baru 20, Kawasan Perindustrian Ringan Kinta, Ipoh di dalam Daerah Kinta**, di dalam Negeri Perak Darul Ridzuan telah melakukan pembunuhan dengan menyebabkan kematian keatas Mohd Hosni Fadzli bin Mohd Amin, KPT: 820610-08-5333 dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Kesiksaan dan dibaca bersama seksyen 34 Kanun yang sama. (emphasis added)

[9] The amended charge dated 19 September 2005 (encl. 41) against the fifth accused in Criminal Trial No. 45-16-04 reads as follows:

> Bahawa kamu bersama-sama dengan Mohd Hafiz bin Ibrahim, Mohd Shafiq Azren bin Mohd Salleh, Mohd Faizal bin Radzali, Mohd Rizal bin Abu Hassan **dan seorang lagi bernama Mohd Nizam bin Ariffin yang masih bebas** bagi mencapai niat bersama kamu semua pada 22 Disember 2003 **di antara jam 3.00 pagi hingga 8.00 pagi**

A **di Ikhwan Auto di No. 19, Hala Rapat Baru 20, Kawasan Perindustrian Ringan Kinta, Ipoh** di dalam Daerah Kinta, Ipoh di dalam Negeri Perak Darul Ridzuan telah melakukan pembunuhan dengan menyebabkan kematian ke atas Mohd Hosni Fadzli bin Mohd Amin KPT: 820610-08-5333 dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun
B Keseksaan dan dibaca bersama seksyen 34 Kanun yang sama. (emphasis added)

[10] The amended charge (encl. 40) was read and explained separately to all the first four accused persons and (encl. 41) to the fifth accused
C person and they pleaded not guilty to the same.

[11] On 19 January 2005, while PW8 was giving evidence under examination-in-chief, learned counsel Mr. Naran Singh for the fifth accused informed the court that as from that day Mr. Christopher Fernando, En. Iszam Kamal Ismail and Mr. Naran Singh will be
D representing the second and fifth accused and this was confirmed by learned counsel Mr. Christopher Fernando.

[12] On 25 November 2005 during the midst of the testimony of the 38th witness being the last witness for the prosecution who was the Senior Investigating Officer, the learned DPP applied to the court to
E tender an additional charge being an offence under s. 365 of the Penal Code against all the five accused persons. This application was made under s. 158 of the CPC. The proposed additional charge was marked as encl. 48 and 48A for criminal trial No. 45-17-04 and 45-16-04 respectively. The learned DPP submitted that the original amended
F charge of murder is to be maintained and the trial was to continue with the proposed additional charge, an offence under s. 365 of the Penal Code against all the five accused persons. Section 365 of the Penal Code states as follows:

G 365. Kidnapping or abducting with intent secretly and wrongfully to confine a person.

Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.
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[13] After hearing both the learned DPP and objection from counsels for the accused persons on the application of the prosecution to include the additional charge, this court posed this question to the learned DPP, namely:

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Court

Question: At what stage can section 158 of the CPC be invoked to include the additional charge? Is it at the close of the prosecution case and before judgment is delivered or in the midst of the prosecution case?

Response: At this stage, the learned DPP applied to withdraw the application to include the additional charge against all the five accused persons as he found his application to be of premature and indicated to the court that he will reapply at the end of the prosecution case.

This court then allowed the prosecution's application to withdraw the proposed additional charge (encl. 48 and 48A) and ordered the proposed additional charge which was tendered to the court to be struck out from the court's record and returned the same (encls. 48 and 48A) to the learned DPP.

[14] On 8 May 2006 after the 38th witness, being the last witness for the prosecution had completed his testimony and before the close of its case, the learned DPP offered 54 witnesses to the defence as per the list which was supplied to the court and marked as encl. 55. However, only 10 out of the 54 witnesses offered were present in court and identified. The learned DPP also renewed his application to tender an additional charge pursuant to s. 158 of the CPC against all the five accused persons, an offence under s. 365 of the Penal Code. The learned DPP submitted that he had received instructions from the Attorney General's Chambers to tender the proposed additional charge only after 36 witnesses had testified with the remaining two more witnesses to be called to testify. The learned DPP also submitted that he had decided to withdraw the application previously on 25 November 2005 to tender the proposed additional charge as he then realised it was a mistake on the part of the prosecution to have applied for leave at that stage as it was premature and decided to reapply at later stage. The defence team objected to the said application to tender the additional charge on the grounds *inter alia* it was prejudicial to the accused persons.

[15] On 11 May 2006 this court informed the parties that the decision of this court on the said application to include the additional charge will be given after hearing submission on the existing amended charge of murder and at the time this court delivers its decision.

[16] In addition to the written submissions filed by both the defence team and the prosecution, this court also heard oral submissions for three days on 23 November 2006, 24 November 2006 and

27 November 2006 on the charge of murder and on the application of the prosecution to tender the additional charge for abduction, an offence under s. 365 of the Penal Code. This court reserved its decision to 24 January 2007.

Joint Trial Or Joint Charge

[17] At the outset of this judgment, this court wish to deal with the submission of learned counsel Mr. Gurbachan Singh for the third accused that the charge framed against all the accused reads as a joint charge and the law on joint charge should apply to this case and he referred to the case of *PP v. Muhamad Nasir bin Shaharuddin & Anor* [1992] 4 CLJ 2028. The important feature of a joinder of two or more accused is that each may be acquitted or convicted independently for committing the offence which is the subject matter of the joint charge. On a joint charge, the prosecution must also adduce sufficient evidence to establish the guilt of each of the accused as a separate exercise and the risk arising out of a joint charge is that the evidence adduced by the prosecution may in some cases not be sufficient to establish the guilt on each and everyone of the accused named in the joint charge. (See *Public Prosecutor v. Muhamad Nasir bin Shaharuddin & Anor* [1992] 4 CLJ 2028; *Jayaraman & Ors v. PP* [1979] 2 MLJ 88; *Public Prosecutor v. Ayyavoo Subramaniam* [2004] 6 MLJ 511. In order to decide on this legal issue, it is important to refer back to the notes of this court at the commencement of the trial. It is clear from the records of this court that at the outset of the trial, the prosecution had in no uncertain terms made an application to this court for a joint trial of both cases, ie, criminal trial No. 45-16-04 against the fifth accused and criminal trial No. 45-17-04 against the first to the fourth accused and it was consented by all the counsels for the accused. Accordingly, this court in the exercise of its discretion ordered both the cases to be heard together as a joint trial. (See *R v. Grondkowski; R v. Mellinowski* [1946] 1 KB 369, *R v. Guram* 62 Cr App R 242). Further the prosecution had made it clear during the Opening Case on 11 January 2005 that the court had in fact ordered both the cases to be heard together as a joint trial and the prosecution had also included s. 34 of the Penal Code in both the charges as an aid to establish their case.

[18] This court is of the view, with respect, that even if the charge as drafted by the prosecution has given an indication or impression that it was a joint charge as submitted by learned counsel for the third accused which in the considered view of this court does not appear to be so, the defence was not in any way misled or taken by surprise that it was a joint charge. The prosecution from the outset of the trial made its stand clear that both the cases were to be tried as a joint trial. Accordingly, this court had on 11 August 2004 on the application of the

prosecution and after having been consented by the defence team as stated above, ordered both the cases to proceed as a joint trial. On the other hand, if at all there was any doubt or ambiguity that the charge appeared to have been drafted as a joint charge, it should have been, with respect, raised or clarified at the time when the prosecution made the application on 11 August 2004 for a joint trial of both the cases or at the time the amended charge was tendered by the prosecution on 19 September 2005 but this was not done.

[19] On 26 January 2005 during the submission on the issue whether PW8's evidence "on the probability value of the Chinese and Indian population data base" was a contradiction or variation of her report (exh. P21) was raised in reference to s. 91 and s. 92 of the Evidence Act 1950, learned counsel for the third accused had infact conceded that it was a joint trial. There is also in record the submission of the leading counsel Mr. Christopher Fernando at the close of the prosecution case that the prosecution was not relying on joint charge but on common intention. Therefore, the submission of learned counsel for the third accused that the charge in both cases are drafted as a joint charge is not a correct proposition and misplaced on the facts and circumstances in the instant case.

[20] Accordingly, this court will proceed to deliver its decision on the basis that both the cases were heard as a joint trial as ordered by this court on 11 August 2004 and the charge as framed is read with the aid of s. 34 of the Penal Code. Consequently, the law under common intention will apply to this case as included in the charge in both the cases and not the law as applicable to a joint charge.

[21] At the outset of this decision, it is important to refer to the Opening Case (encl. 15) of the prosecution which was made on 11 January 2005. Paragraph 5 of the Opening Case states as follows:

> Paragraph 5:
>
> (5) Bagi membuktikan intipati-intipati ini, pihak pendakwaan akan memanggil saksi-saksi yang melihat kejadian berlaku untuk membuktikan tertuduh-tertuduh dengan niat bersama telah sengaja memukul, menumbuk, menendang dan memijak simati **pada tarikh, masa dan tempat seperti dalam pertuduhan**. (emphasis added).

[22] In other words, it was the contention of the prosecution right from the beginning that the deceased was intentionally hit, punched, kicked and stamped by the accused persons with common intention on the date, time and place as included in the charge and this action resulted in the death of the deceased. However, it is interesting to note

A and regrettably the prosecution did not produce any evidence that the deceased was intentionally hit, punched, kicked and stamped on the date, time and place as stated in the charge and which had caused the death of the deceased.(See *PP v. Kang Choo Heng & Anor* [1991] 3 CLJ (Rep) 545 at p. 551; *Pendakwaraya v. Norfaizal* [2004] 1 AMR 310 at
B p. 314-315). On this core alone, 'the whole prosecution case would fall like a pack of cards' and all the five accused persons should be acquitted without any hesitation.(See *Devilal v. The State of Rajasthan* AIR 1971 S.C 1444 at p.1446; 1971 3 S.C.C 471; 1971 Cri.L.J 1132 at p. 1134).

C **[23]** By para. 9 and 10 of the Opening Case, the prosecution has contended as follows:

Paragraph 9:

D (9) Keterangan seterusnya akan membuktikan bahawa simati telah dibawa oleh tertuduh-tertuduh **ke sebuah bengkel iaitu Ikhwan Auto. Simati kemudiannya telah dipukul, ditumbuk, ditendang dan dipijak oleh tertuduh-tertuduh**. (emphasis added)

E Paragraph 10:

(10) **Keterangan melalui saksi-saksi** akan membuktikan bahawa simati telah tidak sedarkan diri **setelah berkali-kali dipukul, ditumbuk, ditendang dan dipijak oleh tertuduh-tertuduh**. (emphasis added)

F **[24]** Infact, there is also no evidence adduced by the prosecution as contended in paras. 9 and 10 of the Opening Case.

[25] By para. 12 of the Opening Case, the prosecution has contended as follows:

G Paragraph 12:

(12) **Saksi akan dipanggil untuk membuktikan simati meninggal dunia di tempat kejadian**. (emphasis added).

H **[26]** On the contention as stated in para. 12 of the Opening Case, there is absolutely no evidence that the deceased died at Ikhwan Auto as stated in the charge.

[27] By paras. 15, 16 and 17 of the Opening Case, the prosecution has contended as follows:

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Paragraph 15:

(15) Keterangan akan dibuktikan bahawa pukulan, tumbukan, tendangan dan pijakan yang dilakukan oleh tertuduh-tertuduhlah yang menyebabkan kecederaan parah pada jantung simati.

Paragraph 16:

(16) Keseluruhan keterangan daripada saksi-saksi pendakwaan bahawa tertuduh-tertuduh dengan niat bersama telah sengaja menyebabkan kecederaan pada tubuh badan simati yang mana kecederaan ini mencukupi dalam keadaan biasa untuk menyebabkan kematian.

Paragraph 17:

(17) Keterangan melalui saksi-saksi pendakwaan akan membuktikan tertuduh-tertuduh telah melakukan pembunuhan ke atas simati.

[28] There is also no positive evidence adduced by the prosecution that first, the alleged hitting, punching, kicking and stamping had caused the serious injuries on the chest of the deceased. Secondly, there is also no eye witness as contended in para. 17 of the Opening Case that the five accused persons were seen hitting, punching, kicking and stamping the deceased at Ikhwan Auto as stated in the charge which caused the death. On the contrary, the prosecution has adduced evidence through PW37 that the hitting, punching, kicking and stamping of the deceased took place outside the Lolly Pub about 2-3 days prior to the deceased's death which does not involve the accused persons. According to PW38, there has been no investigation carried out on that incident and there is no reason advanced why no such investigation was carried out of that incident which took place outside the Lolly Pub. If investigation had been carried out of that incident which occurred outside the Lolly Pub, there is a possibility that some light could have been thrown on the death of the deceased.

[29] The Opening Case of the prosecution which was read out to the court has in fact with respect, misled the court and obviously the accused persons as none of the statement made in the said Opening Case has been established by the prosecution except that Mohd Hosni Fadzli bin Mohd Amin had died and the cause of the deceased's death was due to a blunt trauma to the chest being 'cardiac tamponade' as stated in the post mortem report (exh. D25) and the burial certificate (exh. P24) and the evidence of PW10 and some part of paragraph of the Opening Case. In other words, there is obvious discrepancy between the Opening Case for the prosecution and the evidence which was adduced on behalf of the prosecution at the trial. (See *R v. Franco* [2003] S.A.S.C 140.

A **Additional Charge (Section 158 Of The CPC)**

[30] In considering the application of the learned DPP pursuant to s. 158 of the CPC to add the proposed new charge, an offence under s. 365 of the Penal Code, this court must consider if there are sufficient materials before the court in the evidence produced during this trial to justify the exercise of its discretion. Section 158 of the CPC expressly and clearly gives the power to the court to alter or add to the charge at anytime before the pronouncement of judgment. Section 158 of the CPC states:

> 158. Court may alter or add to charge.
>
> (1) Any Court may alter or add to any charge at any time before judgment is pronounced.
>
> (2) Every such alteration or addition shall be read and explained to the accused.

[31] However, this discretionary power must be exercised judicially. In order for this court to exercise its discretionary power, this court must be satisfied that there are sufficient materials before the court to consider or justify invoking its powers under s. 158 of the CPC and it must be invoked only at the appropriate time as expressly regulated by s. 158 of the CPC. The procedure expressly regulated by s. 158 of the CPC cannot be varied by consent or be waived. With all respect to the learned DPP, he appears to have fallen into error when he argued that this court stay this trial on the charge of murder and proceed with abduction charge, where 38 witnesses had testified and the prosecution has closed its case on the charge of murder and have also offered 54 witnesses to the defence. The application of the learned DPP is unaccompanied with any material or authority to support his contention that this court ought to on the facts and circumstances in the instant case add the charge of abduction to the existing charge of murder by invoking its power under s. 158 of the CPC. In fact, the defence team had strenuously objected to the application of the learned DPP to the proposed additional charge at such late stage of the trial as it would among other reasons be prejudicial to the accused persons.

[32] This court is of the view that the justice of the case demands that the application of the learned DPP to include the additional charge of abduction ought to be rejected outright for the following reasons:

a) this is not a case where the additional proposed charge by the prosecution came to light only after the trial had commenced or after it had considered the totality of the evidence at this trial as the prosecution had the materials or information right from the beginning of the trial or during investigation stage itself by the investigating

agency as even the police report (exh. P1) which was lodged by PW34 (the father of the deceased) states of a possible offence of abduction.

b) the 'ringkasan kenyataan' in the borang police form 31 handed to PW8 on 11 May 2004 states as follows:

> Pada 22.12.2003 jam lebih kurang 0345 hrs simati telah dilarikan daripada rumahnya oleh beberapa lelaki Melayu ... .
>
> ... tidak lama selepas itu, sekitar jam lebih kurang 1000 hrs 22.12.2003 simati telah dihantar ke Hospital Ipoh Specialist oleh mereka yang melarikannya ...

c) it is also stated in the Borang Pemeriksaan Mayat Polis No. 61 handed to PW10 states as follows:

> Pada awal pagi 22.12.2003, simati telah dilarikan dari rumahnya oleh sekumpulan lelaki Melayu ...

d) The information received by ASP Suraiya binti Ahmad (PW27) as testified by her states as follows:

> Pada 22.12.03 jam lebih kurang 7.00 pagi saya sedang bertugas di Pejabat Cawangan A Team, Ibu Pejabat Daerah Polis Ipoh. Pada jam 7.00 pagi (saya minta izin untuk merujuk kepada Diari Siasatan saya) saya sedang bertugas di Pejabat A Team Ibu Pejabat Daerah Ipoh. Saya ada menerima maklumat menerusi panggilan telefon daripada anggota bertugas di Balai Polis Jelapang. Menerusi maklumat yang diterima, anggota melaporkan terdapat satu laporan yang menyatakan seorang lelaki Melayu telah dilarikan dari rumahnya oleh sekumpulan lelaki.

e) The information received by ASP Shazeli bin Kahar (PW38) also states as follows:

> Pada 22.12.03 jam lebih kurang 8.00 pagi saya berada di Markas FRU Sungai Senam, Ipoh. Pada tarikh tersebut saya telah terima satu panggilan telefon daripada ASP Suraiya memaklumkan satu repot iaitu Jelapang Report 3793/03 menyatakan bahawa ada satu lelaki Melayu telah dilarikan daripada rumahnya oleh sekumpulan lelaki Melayu lain.
>
> ... saya telah diarahkan oleh pegawai saya supaya menjalankan siasatan awal dibawah Seksyen 365 Kanun Keseksaan.

(f) By para. 7 and 11 of the Opening Speech (encl. 15), the prosecution had contended as follows:

(7) Saksi-saksi akan memberi keterangan melihat tertuduh-tertuduh telah mengangkat simati dan menghumbankannya ke dalam sebuah kereta yang kemudiannya memecut keluar dari situ. Sebuah lagi kereta yang digunakan oleh tertuduh-tertuduh juga kelihatan memecut keluar dari situ.

(11) Seorang saksi iaitu bapa simati telah membuat laporan polis setelah diberitahu bahawa anaknya itu telah dipukul dan diculik oleh tertuduh-tertuduh.

[33] However, although the police report (P1) itself raises the possible offence of abduction and that instructions were given to PW38 to carry out investigation on the offence under s. 365 of the Penal Code, it is strange that, the instruction from the Attorney General's Chamber was only received by the learned DPP to apply to include this additional charge only after 36 witnesses has testified at this trial with remaining two more witnesses.

[34] This court will be more readily satisfied to exercise its discretion in favour of granting leave to the application of the learned DPP depending on the nature and extent of the circumstances and provided the prosecution had acted with all due diligence and expedition and there is no unfairness which would result to the accused person or an element of real prejudice. (See *R v. Solomon* [1980] Cr App R. 247 at p. 249-250). Having reviewed the history of this case and surrounding circumstances as stated above, this court finds that there was lack of diligence and expedition on the part of the prosecution to bring this additional charge to trial as quickly and as reasonably and fairly as possible. This court is mindful that it would be undesirable to compile a list of matters that may be relevant to consider in deciding this application as provided by s. 158 of the CPC. However, the learned DPP should have been vigilant to ensure that the prosecution act with all due expedition when making this application and considering the delay and prejudice that may result by granting the application where the prosecution have not shown good and sufficient materials for this want of due expedition and the inordinate delay. The longer the interval between the original trial and the additional charge, the more likely it is that injustice will be caused and in every case in which the additional charge is sought, it is essential to consider with great care whether the accused persons will be prejudiced thereby or there is an element of real prejudice. (See *In Johal and Ram* [1972] 56 Cr. App. 348). In the instant case, the application to add a new charge is made at a very late

stage indeed, the first attempt was during the midst of the testimony of the last witness (PW38) for the prosecution and the second attempt was at the close of the prosecution case and the possibility of prejudice is thereby greatly enhanced. (See *Radley and Radley* [1973] Cr App R 394 at p. 403).

[35] The general rule must be that the prosecutor should if possible and so long as it is within the law combine in one indictment all the charges he intends to prefer and that can also be included as an additional charge. In the instant case, the charge which the prosecution had intended to add being the alleged offence under s. 365 of the Penal Code to the existing charge should have been obvious from the police report (P1) and the instruction given to PW38 to carry out initial investigation under s. 365 of the Penal Code and for the reasons stated above. It is important to note that this court has always a residual discretion to prevent anything which savours of abuse of process. The statutory discretion given to this court by s. 158 of the CPC should be approached with great caution to avoid the danger that this express provision would be undermined by too ready to grant the application based on no proper or reasonable grounds raised by the learned DPP.

[36] The additional charge as proposed by the learned DPP at this stage of the proceedings would also prolong the custody of the accused persons and arguably could tantamount to an abuse of process and probably being used as a 'safety net' as submitted by learned counsel Mr. Christopher Fernando. However, it is unfair to say without proper evidence before this court whether the stand taken by the prosecution to include the additional charge for abduction after 38 witnesses had given evidence was for an oblique motive. On the other hand, what else could it be, where the most serious offence in the Penal Code being murder which has been framed against the five accused persons had proceeded to its conclusion of the prosecution case and in the event the charge is established against the accused persons it would carry only one punishment being death penalty upon conviction.

[37] In the circumstances, can it then safely be inferred that an attempt is being made to invoke s. 158 of the CPC as a 'safety net' as the prosecution must have been already aware that the charge of murder as framed by the prosecution was not taking them to any positive direction and that the prosecution's case was already showing signs of irreparable cracks. Therefore, the best alternative at the time when it was shown that the charge of murder may not be sustainable, it would have been prudent for the prosecution to review the charge of murder and their previous stand as to whether to proceed with the said charge. The prosecution should have reviewed the charge instead of taking

shelter by seeking the leave of this court to include an additional charge, an offence under s. 365 of the Penal Code and to be tried by this court with the existing charge of murder when in fact the proposed additional offence is triable by a magistrate's court for the sake of saving them from embarrassment which is either their own doing or of the investigating agency. In fact, it smacks of an attempt by a disappointed prosecution to find what is considered to be a 'safety net'.

[38] The process of the court and judicial time cannot be abused according to the whims and fancies and due to delayed instructions from the Attorney General's Chamber as admitted by the learned DPP as the instruction from the Attorney General's Chamber was only received after the 36th witness had testified. If the prosecution is aware right from the beginning that a prolong trial such as in the instant case would have a serious risk as judicial time, effort and expressly devoted to it would be lost, is it not appropriate and proper that the prosecution should have reviewed the charge and framed a charge of abduction at the earliest stage of the proceeding before it decided to proceed with the charge of murder if the words justice has any meaning at all. The prosecution has always contended that justice does not only mean to the accused and his family but also to the victims and the state; what about justice to society and public fund in the context where this court has said at the beginning; ie, the prolonged trial which took forty nine (49) days, thirty eight (38) witnesses and four (4) DPP's who were assigned to the trial and who actually participated in the conduct of the prosecution case, the number of objections raised in the course of the trial where it sought the rulings of this court, the extra police personnel placed in court, the number of witnesses who have waited during the trial and to be eventually offered being fifty four (54) witnesses to the defence, judicial time, effort and expenses devoted to this trial. Are all these factors not relevant for the justice system? The criminal justice system with respect, does not permit the prosecution to exercise their powers merely at whim and must satisfy that there is a valid and sufficient ground and that it is a proper exercise in the interest of justice to allow the application to include the additional charge at the time of the close of the prosecution case. It is undesirable to fragment the criminal process to the whims of the prosecution and delay the conclusion of this case as stated above. The delay on the facts and circumstances in the instant case is inexcusable, unreasonable and cannot be condoned.

[39] Insisting of using judicial time and proceeding in an apparent weak case is being most unfair to the system as the court can take steps to dispose off another deserving case which might probably have a *prima facie* case which is pending trial and where the accused is in remand. The prosecution, with respect, should from time to time take positive

steps to review the charge even if the trial had proceeded and this exercise must be a continuing one and ought to be carried out without fear or favour of any accusations which may be thrown along the way as the law provides that the public prosecutor may at any stage of any trial before the delivery of judgment decline to prosecute further the accused upon the charge. In deciding whether to continue with the trial, there may be events which have occurred after the trial had proceeded that made it no longer appropriate for the prosecution to proceed. Alternatively, the strength of the prosecution case should have been reassessed; having regard to the evidence which had emerged and became insufficient to sustain a *prima facie* case and or the public interest would not be served by the prosecution to continue with the trial because of the circumstances and the evidence which emerged during the course of the trial. This court is not even for a moment saying there is any impropriety in the conduct or management of the proceeding as whatever observation made by this court must be fair to the learned DPPs who have handled this prosecution. However, if justice is to come from the court, justice must also come from the prosecution who framed the charge, having regard to the circumstances of the case and in the interest of justice. The objections raised by the defence team to the application of the prosecution to include the additional charge for an offence of abduction under s. 365 of the Penal Code merits serious consideration on the peculiar set of facts and circumstances in the instant case. The prosecution has to be conducted on the principles of absolute fairness and no unfairness should be visited upon the accused persons. In *R v. George Maxwell (Developments) Ltd* [1980] 2 All ER 99, judge David QC said at p. 101:

> A prosecution in the Crown Court is a very serious matter and may have very serious consequence. It is brought in the public interest to punish an offender and not, except indirectly, to compensate the victim. The Crown Court is not an appropriate forum to ventilate a private grievance or to pursue a personal vendetta. Traditionally Crown counsel owes a duty to the public and to the court to ensure that the proceeding is fair and in the overall public interest. The duty transcends the duty owed to the person or body that has instituted the proceedings and which prosecutes the indictment. By tradition and in accordance with etiquette prosecuting counsel adopts a role of impartiality and his duty as is well understood, is not to open to the jury evidence the admissibility of which may be in question, not to attempt an identification of the defendant in circumstances unfair to him, nor to cross-examine on speculative or unverified suggestions. These are but some of the constraints on prosecuting counsel which are well understood and which are vital to ensure a fair trial and to protect the public interest. The interest of a private prosecutor will more often than not be inimicable with

A these duties and constraints. Although there is, as I have said, no modern authority and although the older cases are in conflict, in my judgment the proposition in *Halsbury's Laws of England* is correct. It accords with my own experience of practice in the superior criminal courts, it is justified on the grounds of common sense and is vital to ensure that the public interest is paramount in trials in the Crown
B Court.

[40] Why should this court be prevented from deciding the charge of murder where the prosecution has closed its case and instead accede to the application of the prosecution and stay the decision and proceed to
C formulate another charge being an additional charge as proposed by the prosecution and proceed to try the new charge which as stated above, is triable by a magistrate's court? The prosecution seemed to have not only lost its direction in the instant case but is desperately attempting to take this court to an entirely new path without having laid its foundation. The conduct of the prosecution with respect, is akin to a desperate
D attempt to salvage a broken and sinking ship; the prosecution wants the trial to proceed with the additional charge to the prejudice of the accused persons. (See *Cheng Seng Heng & 4 Ors v. PP* [1949] MLJ 175, *Lee Ah Cheong v. Regina* [1959] MLJ 242, *Khalid Panjang & Ors v. PP* [1964] MLJ 67, *PP v. Heng You Nang* [1949] MLJ 285 at 287, *PP v. Fancis*
E *Dang a/l Nuya* [1988] 1 MLJ 89 at 90, *R v. Cheah Tow Peng* [1952] 216 at 217, *Lew Cheok Hin v. R* [1956] MLJ 131 at 133, *Shahrom bin Ahmad v. PP* [2000] 3 SLR 565 at 579, Mallal's Criminal Procedure 5th Edition, 1998 para 5954; *PP v. Jeorge Enrique Tellon* [1998] 4 CLJ 278; *Wong Seak Fon v. PP* [1972] 1 MLJ 203; *Rogayah bt Che Mat v.*
F *PP* [2001] 5 MLJ 77 at 82; *PP v. Tan Kim Keng* [1962] MLJ at 389; *Rajendra Singh Sethia v. State & Anor* [1989] Cri L.J 255; *Harden* [1962] 46 Cri. Appeal Report 90; [1963] 1 QB 8, *Balbeer Singh Johal v. Gurmit Kelsora Ram* [1972] Cr. Apeeal 348, *Luke Anthony Piggot v. Jefrrey Simon Lippin* [1999] 2 Cr Appeal, *R v. O' Conner* [1997] CLR
G 516). (Note: on the abduction charge, see: *Pritam Singh v. PP* [1970] 2 MLJ 239 at p. 240, *PP v. Lee Beng Siang* [1991] 3 CLJ 2927; [1991] 3 CLJ (Rep) 584)

[41] This court can see no justification for this tactical delay to postpone the decision of this court on the original amended charge of
H murder and continue with the trial by inclusion of and adding a new charge; the only result would be to incur unnecessary public expenses, hardship and prejudice to the accused persons. Such a practice ought in the considered view of this court firmly to be discouraged. The application of the learned DPP to restart the prosecution which had
I effectively been brought to an end could arguably tantamount to an abuse of process of the court. In the particular circumstances of this case, this court, with respect, is of the view that to allow the application would not only be an abuse of process and prejudicial to the accused

persons but it would amount to: "bringing the administration of justice into disrepute" by treating the court, as if it were at the prosecutors "beck and call" in the forthright language of Straughton L.J in *Bloomfield* [1997] 1 Cr. App. R 135 and affront to the administration of justice.

[42] On the facts and circumstances in the instant case, this court finds there are insufficient materials to justify the inclusion of the additional charge. It is important to make it clear that by invoking the provision of s. 158 of the CPC to add the new proposed charge, the prosecution is not applying to amend, alter or substitute the existing charge as it was in *Mohd Yazri bin Minhat v. PP* [2003] 2 CLJ 65 CA but the prosecution is desperately attempting to add a fresh charge and to proceed with the trial after having concluded their case on the charge of murder. (See *Kantilal Chandulal Metha v. State of Maharashtra AIR* [1970] SC 359; *Re Bommareddi Sathiyarayana Reddi AIR* (34) [1947] Madras 170; *Rajendra singh Sethia v. The State & Anor* [1989] Cri LJ 255) Therefore, this court is of the considered view that it will be a gross injustice and oppressive to the accused persons to grant the application of the prosecution at this stage of the proceedings as it would prejudice the accused persons and occasion a miscarriage of justice. (See *PP v. Mohd Ali bin Abang & Ors* [1994] 2 MLJ 12 at p. 21)

[43] Accordingly, the application of the prosecution to add another charge of an offence under s. 365 of the Penal Code with the existing charge of murder at this stage of the proceeding and on the particular set of facts is not allowed. (see also *Hashim & Anor v. PP* [1956] MLJ 233 at p. 234-235)

DNA Evidence

[44] Scientific detection of crime is a comparatively modern development. The principle behind all scientific detection is based on the assumption that "every contact leave a trace", that is, a criminal usually leaves something at the scene of the crime and conversely, it takes something away with him. Among others, hair plays an important part, along with bloodstain and other scientific evidence.

[45] DNA profiling is a name given to the new scientific testing method that is supposed to positively identify individuals by their genetic materials and they can be ascertained from the hair or blood or semen or tissue or saliva of that individual. By using DNA profile, the police or the investigating agency would be able to identify individuals to prove his or her absence or presence at the scene of the crime. Usually the police will attempt to identify whether the accused was in fact at the scene by comparing his blood, hair with the bloodstain or hair found at the scene.

[46] On the issue whether the accused persons had been identified as the assailant of the deceased, the prosecution had introduced DNA profile with the view to link the accused persons to the crime of murder. The cogency of DNA evidence makes it particularly important that DNA testing is rigorously conducted so as to obviate the risk of error in the laboratory, that the method of the DNA analysis and the basis of subsequent statistical calculation should so far as possible be transparent to the defence and the true import of the resultant conclusion is accurately and fairly explained to the court in lay language. It is then for the court to decide, having regard to all the relevant evidence whether the court can be sure that it was the accused persons who left the crime stain, or whether it is possible that it was left by someone else with the same matching DNA characteristics.

[47] In the instant case, this court finds that the evidence of Dr Chang Yuet Meng (PW8), forensic DNA scientist and head of the DNA Paternity Department at the time of giving evidence in court on 14 January 2005 as being most wanting, unreliable and unsafe to accept for the following reasons:

a) There is no evidence that PW8 is a DNA expert as admitted by her as at the material time, she was only the head of the Paternity Department in the Department of Chemist, Petaling Jaya only since January 2004 and neither it is stated in her curriculum vitae (exh. P19) that she is a DNA expert whereas, she had carried out the analysis of the exhibits which she received on 11 May 2004.

b) On 14 April 2005 was the first time PW8 had given evidence in a murder case at the High Court in this trial.

c) PW8 admitted that this murder case has nothing to do with paternity.

d) There is admission by PW8 that she is not an expert in a human population genetic although she has said that she has enough knowledge to interpret DNA results.

e) PW8 was conducting a Ph.D research project/thesis for DNA analysis in Forensic Science Centre, Adelaide Australia from January 2000 to December 2003 whereas she carried out DNA analysis of the 27 exhibits which she received on 11 May 2004. She had only worked for five months after having completed her Ph.D research/ thesis on DNA analysis where she was posted as the Head of the Paternity Department in January 2004.

f) PW8's working experience prior to January 2004 in the department of chemistry has no bearing to the job of an expert in DNA.

g) PW8's membership of professional organization or representation at committees as stated in exh. P19 is of no legal significance or purpose in order to give weight to her evidence supposedly as a DNA expert.

h) PW8's presentation of lectures on DNA profiling as stated in exh. P19 was only after February 2004 and this may be relevant for the purpose of her own exposure in that field

i) PW8's proficiency testing participation on forensic DNA analysis was only in March 2004 as stated in exh. P19.

j) The evidence of Nazriya bt Shafie (PW9) had cast doubt on the handling of the exhibits and the manner the test was carried out and the competency of the same. Consequently, the DNA analysis when considering the entire evidence of PW9 as to her actual role and that of PW8 in the tests carried out in analyzing the exhibits sent to the department of chemist by the investigating agency for DNA profiling is questionable and leaves much to be desired.

[48] In any event, there must be evidence about competency to give expert evidence (See *Rajikshore v. State* AIR 1960 Cal. 321). In the instant case, the prosecution had failed to prove the expertise of PW8 by introducing evidence as required by law. (See *Wong Chop Saow v. PP* [1965] 1 MLJ 247; *PP v. Lin Lien Chen* [1990] 2 CLJ 1020; [1990] 2 CLJ (Rep) 746 (HC); [1992] 2 MLJ 561 (SC))

[49] There is another legal issue where the probability of coincidental match from a randomly selected, unrelated individual based on the population database of Malaysian Malay was arrived by PW8, by the use of the computer software as admitted by PW8 that the DNA analysis and these values were calculated using computer software. Further, other probabilities values and figures were arrived by the use of computer. The contents of exh. P21 and all probabilities values were also obtained from the computer. At this stage, it is important to state that it has become clear from the evidence of PW8 that the information obtained by PW8 to arrive at her finding in the DNA analysis and the contents of exh. (P21 A-I) were based on the computer print out. In order to accept the information given by the computer software and the print out, there must be compliance with s. 90A of the Evidence Act 1950 before it can be admitted in evidence as in the case of exh. (P39A-D) which is a certificate *in lieu* of oral evidence.

[50] In the instant case, there is no evidence of such compliance of the condition precedent as required by s. 90A of the Evidence Act 1950 for exhibit (P21 A-I) to be admitted. There is no certificate tendered in

evidence with regard to the admissibility of the statement in exhibit (P21 A-I). Therefore, oral evidence is required to establish the condition precedent as required by s. 90A(1) in order to show that the statements contained in exhibit (P21A-I) and the information collected by PW8 from the computer software were produced by the computer in the ordinary course of its use and to comply with s. 90A(4). In the absence of the said certificate having been tendered in evidence under s. 90A(2), there must be oral evidence *in lieu* of the presumptions attached to the certificate as required by s. 90A(4). In the instant case, the condition precedent for the admission of the computer print out has not been established. (See *Hanafi Mat Hassan v. PP* [2006] 3 CLJ 269 at p. 307-312; *Gnansegaran Pararajasingam v. PP* [1997] 4 CLJ 6; *R v. Shepperd* [1993] 1 All E.R 225 at 231; *PP v. Ong Cheng Yong* [1998] 4 CLJ 209; *Schmidt Scientific Sdn Bhd v. Ong Han Suan & ORS* [1998] 1 CLJ 685; *PP v. Gurdial Singh Get Singh* [2005] 6 CLJ 272.)

[51] Therefore, in the circumstances, this court is of the considered view that exhibit (P21 A-I) is inadmissible in law for failure to comply with the condition precedent for the admissibility of the computer print out. Further still, the evidence of PW8 is also not of much assistance to the court to implicate the accused persons to the charge of murder as per the charge. (See *Munusamy v. PP* [1987] 1 MLJ 492; *PP v. Lin Lien Chen* [1990] 2 CLJ 1020; [1990] 2 CLJ (Rep) 746; *Junaidi Abdullah v. PP* [1993] 3 MLJ 217 at p. 228-230; *Kumaraguru & Ors v. PP* [1994] 1 MLJ 254 at 258; *Khoo Hi Chiang v. PP* [1994] 2 CLJ 151 SC). Accordingly, for the reason stated above, the information collected from the computer software to produce the result of the DNA analysis and the print out (exh. P21 A-I) is not to be taken into consideration.

[52] On the other hand, even if due weight is given to the DNA evidence, it could be argued that it would only mean that the accused persons were near the scene and did not connect them to the offence as charged and as per the charge in the absence of other incriminating evidence. (See *Lonsdale Nathaniel* [1995] 2 CR App R 565, *Alan James Doheny Gary Adams* [1997] 1 Cr. App R 369, *Stephen Cooke* [1995] I Cr App R 318, *Micheal Gordon* [1995] 1 Cr. App R 290 and *Public Prosecutor v. Loo Seng Yip* [2005] 1 AMR 647 at p. 651-657, *Denis Adams* [1996] 2 Cr App. R 467).

[53] In the circumstances, this court is of the considered view that first, the evidence contained in exhibit (P21 A-I) is inadmissible for non compliance with s. 90A(2) of the Evidence Act 1950 and secondly, no weight can be sufficiently given to the evidence of PW8 for the reasons stated above.

Medical Evidence

[54] Post mortem examination of the body of the deceased or a corpse arising out of a criminal of an offence is centuries old. Therefore, it is of the utmost importance that the post mortem is carried out only by a qualified medical personnel ie, a pathologist and not a hospital attendant or hospital assistant as it happens in some hospitals and as admitted by En. Zainuddin bin Mohd Zin (PW29) the hospital assistant at the Forensic Department, Hospital Ipoh. PW29 has testified as follows:

> Doktor sahaja melakukan bedah atas mayat. Kadang kala doktor minta Attendan potong (bedah) Simati. Saya juga ada potong dimana diminta oleh doktor. Saya tahu anatomy sikit-sikit. Saya tidak pasti berapa kali saya ada potong tetapi banyak kali. Apabila Attendan potong, boleh berlaku dipotong silap dan cuai. Sudah lama berlaku praktis Attendan yang potong bodies kadang kala Attendan boleh terpotong. Terpotong heart jarang berlaku tapi boleh berlaku. Saya tidak tahu berapa kali telah berlaku Pembantu atau Attendan terpotong dan cuai. Saya tidak tahu doktor ada pernah memberi keterangan di Mahkamah dan mengaku sesuatu terpotong (accidentally cut) oleh Attendan-Attendan atau Pembantu Perubatan. Kadang kala doktor pun boleh cuai (terpotong) masa pembedahan. Cara umum dalam laporan post mortem bukan semua kecederaan-kecederaan dapat terkandung dan berlaku sebelum bawa ke mortuary.
>
> Post mortem tidak boleh dijalankan tanpa ada doktor. Itu adalah praktikal dan perlu dipraktikan oleh doktor mengikut peraturan, saya tidak boleh membuat pembedahan dan itu adalah salah tapi saya ada membuat pembedahan banyak kali. Mengikut undang-undang, hanya doktor sahaja boleh membuat pembedahan. Kalau doktor suruh saya membuat pembedahan, kedua-dua saya dan doktor bersalah dan peraturan tidak dipatuhi oleh saya dan doktor.
>
> Pemeriksaan Semula
>
> Pembantu Perubatan juga melakukan pembedahan (post mortem) walaupun itu adalah salah, kerana setengah doktor baru bertugas tidak begitu tahu bagaimana menjalankan (pembedahan) bukan post mortem keatas mayat untuk melihat organ dalaman dan segala pemeriksaan selepas itu dilakukan oleh doktor tersebut. Cara Pembantu Perubatan melakukan pembedahan dengan memotong bermula daripada bahagian dada, turun ke bawah sehingga ke bahagian perut. Pada masa itu, doktor berada bersama-sama. Pada masa saya menghulurkan bekas untuk Pakar isi specimen, mayat berada di atas meja autopsy. Pakar tersebut ialah Dr. Mohamad Shafie bin Osman. Saya hulurkan kepada doktor di dalam Bilik Autopsy. Ada berlaku di Hospital dimana Attendan ada terpotong lain-lain organ. Attendan melakukan pembedahan dalam kes-kes yang doktor kurang tahu memulakan pembedahan terutama bagi doktor yang baru.

[55] The evidence of PW29 is of much greater public importance. This court observes with concern and disapproval the fact that the hospital authority at the Hospital Ipoh had taken it lightly to instruct a hospital attendant or hospital assistant to perform a post mortem. It is totally wrong for a hospital attendant or assistant to perform a post mortem as testified by PW29. It is not right that the hospital authorities should instruct, allow or permit a hospital attendant or assistant to perform a post mortem. It is hoped that this observation by the court as admitted by the 29th witness for the prosecution would be brought to notice of the hospital authorities for such action as they may think necessary as this practice is highly undesirable and should be avoided.

[56] In any event, in the instant case, the post mortem was carried out by a forensic expert (PW10). As for the evidence of the forensic expert (PW10) as to what had caused the death of the deceased, this court finds that the evidence adduced on behalf of the prosecution is open to several inferences to be drawn. PW10 has also admitted that the injuries on the chest of the deceased need not necessarily be caused by kicking, punching or stamping as it can also be caused by a fall on a blunt object such as stone, piece of wood, corner of a table, chair, zinc or bathtub. PW10 had also admitted that it is difficult to estimate the time of death. He has also agreed that a person who had sustained injury to the chest ie, 'cardiac tamponade' can survive for few days but not for few weeks. However, he was of the view that the injury to the said deceased could have occurred less than twenty four (24) hours but he is still unable to confirm the time of death and he cannot for certain state when the injury was sustained. In this context, it is important for this court to consider and it cannot be ruled out with certainty whether the injuries sustained during the fight about 2-3 days outside the Lolly Pub prior to the death of the deceased could have caused the death of the deceased as the medical evidence itself is not satisfactory and leaves for several inferences to be drawn as to the cause of the death.

[57] In considering the totality of the medical evidence, this court finds that PW10 has left the cause of death open to several inferences and it cannot be ruled out that the injuries sustained about 2-3 days outside the pub in a fight prior to the death of the deceased could also have contributed to the death of the deceased. Infact, it is the duty of the prosecution to eliminate that the injury or injuries sustained during the fight outside the pub which has not been disputed by the prosecution as having occurred and also that that injury or injuries has no bearing to the death or had contributed to the death of the deceased and this burden is on the prosecution. It is interesting to note that the evidence produced by the prosecution has actually revealed that the hitting, punching, kicking and stamping of the said deceased only took place about 2-3 days outside the Lolly Pub before the occurrence of the

alleged incident as contained in the charge where the accused persons are not implicated and it did not happen at Ikhwan Auto as per the charge.

[58] There is another obvious and fatal discrepancy in the post mortem report (exh. D25) which states that the post mortem was carried out on 22 October 2003 when the deceased was brought in dead whereas the evidence produced by the prosecution and the charge states that the deceased was murdered on 22 December 2003 and this was also supported by the burial certificate (exh. P24). The prosecution had failed to clarify whether this fact was a mistake or a typo error. The prosecution cannot ask this court to assume that the date 22 October 2003 as stated in the post mortem report is a typo error as only the maker of the document ie, SP10 would be able to clarify this but unfortunately this was not clarified by the prosecution and no explanation was forthcoming as to why this was not done.

[59] This court finds that the medical evidence of PW10 has also not been of much assistance to the prosecution to prove the charge against the five accused persons or implicate them on the charge as there are more than one inference which can be drawn from the set of facts as to the cause of the injury and bearing in mind that there are also other injuries which are included in the post mortem report which indicates that there were more than one incident and this would include the assault on the deceased outside the Lolly Pub about 2-3 days prior to the alleged incident as per the charge which does not implicate the accused persons. On the other hand, the medical evidence even if accepted can only be used as a corroborative piece of evidence. In any event, the extent of injuries and cause of death as testified by PW10 is insufficient to corroborate the evidence of PW37 in material particular as required by law as the fight and injuries suffered by the deceased outside the Lolly Pub about 2-3 days prior to his death is also part of the evidence adduced in this trial but admittedly there has been no investigation carried out by the investigating officer.

Identification Parade

[60] Generally, identification parade is required to be conducted if the witness has seen the commission of the crime but does not know the offenders or offender before the occurrence of the incident. However, failure to hold identification parade does not necessarily result on the evidence of identification in court becoming inadmissible. However, where there was no identification parade conducted by the investigating agency and the prosecution is relying on the identification of the accused for the first time in court in the instant case against the fourth accused, it

A is not safe to act on such evidence. (See *Bollivaram Pedda Narsireddy v. State of AP* [1991] Cr LJ 1833 (AC); *PP v. Ayyavoo Subramaniam* [2004] 6 MLJ 511)

[61] Nevertheless, the fact of identification of the fourth accused by the witness (PW36) in court for the first time is of a little weight or consequence where he does not know the fourth accused prior to the alleged incident outside the deceased's house. Further, he has also testified that he cannot identify the person who held the deceased and the person who held PW35 as it happened at a distance. In those circumstances, the identification of the fourth accused in court for the first time cannot be regarded as sufficient evidence unless there is a good corroboration, and corroboration must be as defined in *R v. Baskerville* [1916] 2 KB 658. In any event, the incident which occurred outside the deceased's house as testified by PW36 did not cogently and firmly establish the guilt of the accused persons as per the charge and the cause of death of the deceased.

[62] In the instant case, the identification of the fourth accused person by PW36 in the incident which took place outside the deceased's house is not safe to accept as there was no evidence of any feature or description having been given to the investigating agency in order to implicate the fourth accused with the incident outside the deceased's house. Further, PW36 was not even able to identify anyone at the identification parade. In any event, even if the identification of the fourth accused in court is accepted, it has no relevance or bearing to the charge of murder which is alleged to have taken place at Ikhwan Auto as per the charge.

Position Of PW37

[63] The evidence of PW37 under cross examination is crucial in deciding whether his evidence is that of a disinterested witness or partisan which is as follows:

> Saya menyerah diri kepada polis kerana saya rasa saya perlu melakukan sesuatu. Norashimi tidak menasihatkan saya untuk menyerahkan diri kepada pihak polis. Saya ada berunding dengan bapa simati dan keluarganya pada 22.12.03 jam lebih kurang 6.00 pagi mengenai kes ini dan untuk diselesaikan. Saya ingin menyelesaikan kes ini dengan cara bapa simangsa ingin mendapat semula anaknya.
>
> Soalan: Awak bersetuju untuk serah balik simati Hosni kepada bapanya?

Jawapan: Saya hanya memberitahu Tok Mat supaya serahkan semula anak Abang Amin untuk tidak memanjangkan perkara tersebut. Saya dan Tok Mat Crane ada bersetuju untuk serah balik simati kepada bapanya dan itu untuk penjelaskan kes itu. Saya tidak minta jaminan daripada bapa simati Hosni bahawa kalau simati diserah dalam keadaan elok balik, beliau untuk menarik balik repot polis, Tok Mat yang minta seperti itu.

Soalan: Bapa Hosni simati ada memberitahu Mahkamah bahawa awak dan Tok Mat Crane ada meminta jaminan kalau simati diserah balik dalam keadaan elok dan ingat baik-baik?

Jawapan: Saya tak pasti saya tak tahu apa-apa yang diberitahu oleh bapa simati di Mahkamah seperti dikatakan oleh peguam. Saya tak minta jaminan tersebut. Saya ada minta untuk menyelesaikan masalah dengan baik dengan cara Tok Mat memulangkan semula anak Abang Amin dalam keadaan yang elok dan kesemuanya bersetuju untuk tidak memanjangkan hal ini. Maksud saya tidak memanjangkan hal ini sebenarnya bukan saya seorang yang berada dalam perbincangan hal ini. Kesemuanya terlibat dalam perbincangan tersebut. Perbincangan tersebut adalah apabila Tok Mat memulangkan simati kepada Abang Amin dalam keadaan yang elok, Abang Amin akan menarik balik repot polis. Saya bersetuju bahawa saya ada memberi jaminan bahawa simati dalam keadaan baik dan pada masa itu saya ada bercakap benar. Perbincangan dengan Abang Amin berlaku selepas pukul 8.00 pagi. Saya pergi ke bengkel dalam lebih kurang pukul 5.00 pagi dan saya berjumpa dengan bapa Hosni jam lebih kurang jam 8.00 pagi dan saya memberitahu dia anaknya dalam keadaan pengsan. Benar, saya ada memberitahu Abang Amin bahwa anak dia ada dalam keadaan elok. Pada perbincangan tersebut saya hanya di belakang dan hanya memberi cadangan kepada Tok Mat. Betul saya dan Tok Mat ada memberitahu dan berjanji anak dia akan diserahkan balik dalam keadaan elok.

Soalan: Bapa simati (Abang Amin) ada memberitahu Mahkamah kamu dan Tok Mat ada meminta wang daripada beliau?

Jawapan: Tidak.

Saya tak pasti siapa yang meminta wang. Pada masa itu, (1) Tok Mat, (2) Shimi (3) Abang Razali dan saya berada bersebelahan. Disebelahan saya, saya tak pasti siapa yang meminta wang. Perkara wang ini ada dibincang. Bapa simati ada bersetuju untuk membayar wang dan saya berada di situ semasa perkara ini dibangkitkan. Saya tidak menasihatkan Tok Mat Crane untuk melarikan diri. Saya ada memberitahu Tok Mat Crane bahawa beliau tidak boleh melarikan diri dari perkara ini kerana ada orang

melihat beliau. Saya tidak membuat laporan Polis mengenai perkara itu kerana saya terkejut dengan kematian anak Abang Amin. Saya terkejut kematian anak Abang Amin kerana saya tidak menyangka yang anaknya akan mati. Saya dapat tahu anak dia telah mati di Ipoh Specialist Centre. Saya tidak ingat waktu itu tapi dalam bilik kecemasan. Saya dapat tahu dia telah mati. Dalam wad kecemasan dan selepas itu, saya panik dan melarikan diri.

Saya tinggal di rumah kawan saya dua malam. Pada masa itu, Shimi ada kontek saya. Shimi cakap buat apa melarikan diri kalau saya tidak melakukan kesalahan. Dia menasihatkan saya supaya balik tetapi saya bercakap berilah masa untuk saya berfikir. Selepas itu, saya rasa saya perlu buat sesuatu yang betul untuk diri saya dan meneruskan kehidupan saya yang tak tentu. Shimi adalah bekas anggota Polis. Shimi ada terlibat dalam perbincangan itu. Shimi tidak ditahan oleh pihak polis. Tak silap saya saya ditahan oleh polis lima malam. ASP Suraiya ada menyoal siasat saya. Saya menyerah diri. Pada malamnya saya menyerah diri dan ditahan sebagai suspek dalam pembunuhan ini. Saya tidak tahu bila status saya diubah dari suspek kepada saksi.

Soalan: ASP Suraiya ada memberitahu Mahkamah dia ada membuat perjanjian dengan awak bahawa jika kamu memberi keterangan terhadap kelima-lima tertuduh melibatkan mereka dalam kes ini, kamu tidak akan didakwa dan hanya digunakan sebagai saksi?

Jawapan: ASP Suraiya tidak membuat sebarang perjanjian dengan saya. Tidak ada sebarang perjanjian di antara saya dengan ASP Suraiya. Apa yang saya ceritakan kepada beliau adalah kenyataan Shimi ada menelefon saya sebelum saya membuat rundingan dengan bapa simati. Dia menyuruh saya mencari Tok Mat kerana katanya Tok Mat telah melakukan hal. Respon saya, saya bercakap, berilah saya 5 hingga 10 minit untuk mencari Tok Mat. Pada masa saya berbohong kepada Shimi, padahal Tok Mat berada di situ. Saya tak suka bohong. Saya bukan bohong bila perlu, Shimi menyuruh saya mencari Tok Mat dan Tok Mat ada melakukan hal. Saya tidak tanya dia apa hal itu. Dalam kes ini, saya hanya tahu apa berlaku daripada Tok Mat. Saya tidak tahu apa yang berlaku sebenarnya. Saya setuju bahawa apa yang diberitahu oleh Tok Mat adalah sebenarnya dan kalau dia tipu saya, saya tidak tahu.

Pada 22.12.03 jam 6.30 pagi Tok Mat berada dengan saya. Saya tidak bersama dengan Tok Mat Crane pada masa beliau menelefon kawan dia dan meminta wang

RM5,000.00. Saya tidak tahu Tok Mat Crane ada meminta wang. Saya tak tahu dia menelefon mengenai wang itu. Dalam perbincangan saya tahu perkara wang yang diminta. Yang setahu saya RM5,000.00 itu yang diminta dan betul. Saya tidak membantah mengenai wang RM5,000.00 itu. Selepas saya tahu Hosni meninggal dunia, saya panik dan melarikan diri. Saya setuju bahawa saya lari kerana saya panik takut akan ditangkap oleh pihak polis. Saya tidak setuju bahawa saya tahu saya tidak boleh melarikan diri lagi dan sebab itu saya datang ke Ipoh dan menyerahkan diri kepada polis. Saya tak setuju bahawa saya menasihatkan kawan-kawan saya untuk melarikan diri. Saya tahu macam mana Norashimi terlibat dalam kes ini setelah mendapat telefon daripada Abang Razali untuk mencari Tok Mat. Saya dan Shimi adalah kawan rapat. Walaupun Shimi adalah kawan rapat saya, saya ada berbohong kepada beliau mengenai Tok Mat Crane.

Soalan: Saya kata kamu dan Tok Mat Crane dalam kes ini berselisih faham dengan Hosni simati.

Jawapan: Tidak. Saya tidak setuju saya ada menyuruh kelima-lima tertuduh membawa Hosni ke Bengkel Ikwan untuk berbincang mengenai kes ini.

Soalan: Mereka sampai di sana lebih kurang 7.00 pagi dan kamu dan Tok Mat Crane mengarahkan kelima-lima tertuduh ke Klinik Bhajan?

Jawapan: No. Saya tidak pasti siapa yang arahkan Hosni dibawa ke Klinik Bhajan. Mereka ada membawa Hosni ke Klinik Bhajan. Mereka membawa ke Klinik Bhajan saya tidak tahu dan tidak nampak siapa yang bawa. Saya tidak ada dekat Klinik Bhajan. Saya baru sampai di belakang Klinik Bhajan dan tiba-tiba dia menelefon Klinik Bhajan tak accept. Saya tidak tahu kenapa Klinik Bhajan tidak accept. Saya tidak tahu nurse keluar dan lihat Hosni. Shimi yang membuat cadangan supaya Hosni dibawa ke Ipoh Specialist Centre. Saya telefon Shimi bahawa Klinik Bhajan tidak menerima budak tersebut dan beliau menyatakan kepada saya lebih baik kalau bawa ke Ipoh Specialist Centre, yang lebih besar. Saya tidak tahu nurse di Klinik Bhajan tidak accept kerana tidak ada facilities/kemudahan di situ sehingga sekarang saya tidak tahu. Selepas itu di atas arahan Shimi, saya suruh Hosni di hantar di Ipoh Specialist Centre. Saya ada menemani Hosni untuk ke wad kecemasan. Saya tinggal sana lebih kurang 5 minit. Saya ada jumpa Doktor. Doktor yang memberitahu dia meninggal. Bila Doktor beritahu dia meninggal dunia saya yang first untuk melarikan diri. Lepas

itu saya bawa Boy TC ke rumah Man Datuk (OKT5). Saya tidak memberitahu Boy TC bahawa saya ingin melarikan diri. Saya tidak mahu melarikan diri daripada Boy TC dan lain-lain tertuduh. Pada masa itu saya berumur 28 tahun dan sekarang yang tiba 31 tahun di bulan Julai. Saya yang paling tua di antara kelima-lima tertuduh dan Hosni. Badan saya yang besar sekali di antara kelima-lima tertuduh dan saya body building lebih. Pada masa itu saya belum berkahwin dan sekarang saya sudah berkahwin.

Soalan: RM5,000.00 yang diminta daripada Abang Amin bapa Hosni adalah dituntut untuk diri kamu dan Tok Mat Crane dan Norashimi untuk menyerahkan Hosni semula kepada bapa Hosni?

Jawapan: Tidak.

Pemeriksaan Semula

Saya tidak tahu siapa yang minta RM5,000.00 dalam perbincangan itu tetapi semasa saya ada Tok Mat tak minta (saksi volunteer to say Tok Mat tidak minta RM5,000.00). Dalam perbincangan, saya tahu ada permintaan RM5,000.00 tetapi saya tidak tahu untuk tujuan apa.

Saya tidak memberitahu Boy TC bahawa saya ingin melarikan diri kerana saya dalam keadaan panik.

Soalan: Apabila Norashimi minta Hosni di hantar ke Ipoh Specialist Centre, adakah awak menganggap sebagai satu arahan?

Jawapan: Tidak, saya menganggap itu adalah cadangan yang baik. Mereka yang membawa Hosni ke Klinik Bhajan saya tidak tahu kerana saya tidak nampak. Man Datuk telefon Tok Mat mengatakan bahawa Klinik Bhajan tidak mahu accept.

Saya berbohong kepada Shimi pada hal Tok Mat berada bersama saya kerana saya tidak mahu Shimi tahu saya sudah berada bersama Tok Mat.

Soalan: Mengapa awak perlu bersembunyi di rumah kawan selama dua hari di Kuala Lumpur?

Jawapan: Kerana saya tidak tahu apa nak buat pada masa itu dan fikiran saya berkecamuk tidak tentu arah.

Soalan: Pada mulanya awak kata Hosni dalam keadaan pengsan dan kemudian awak kata Hosni dalam keadaan elok dan ada dua jawapan?

Jawapan: Pada awal perbincangan saya menyatakan anak Abang Amin dalam keadaan elok tetapi setelah berbincang bersama Abang Razali, Shimi dan Tok Mat kami tidak

perlu berbohong kepada Abang Amin yang anaknya telah pengsan dan kami menceritakan perkara yang sebenarnya kepada beliau.

At this stage, it is important for this court to consider the evidence of ASP Suraiya binti Ahmad (PW27) under cross examination who is also the investigating officer in the instant case:

Saya bertugas di Ibu Pejabat Polis Daerah Ipoh selama lebih kurang dua tahun. Sebelum kejadian kes ini saya bertugas di Ipoh selama dua bulan. Sebelum itu, saya masih dalam latihan. Saya hanya ada dua bulan experience sahaja sebelum kes ini. Saya bukan mengenali semua detektif yang bekerjasama dalam kes ini. Saya setuju bukan semua detektif dan anggota yang boleh saya betul-betul percaya.

Saya tidak tahu berapa orang anggota yang telah membocorkan maklumat-maklumat mengenai kes ini. Dua orang telah ditahan selain daripada 5 orang suspek dalam kes ini. Seorang lagi suspek masih bebas. Dua orang tadi yang saya sebutkan termasuk seorang yang masih bebas tidak dimasukkan dalam senarai suspek. Yang saya tahu seorang suspek yang masih bebas masih tidak dimasukkan ke dalam senarai suspek yang ada. Yang saya tahu tidak ada suspek lain yang boleh dimasukkan dalam senarai suspek tapi tidak di masuk. Nama-nama dua suspek yang dikeluarkan daripada senarai ialah:

(1) Wan Sumazlee dan

(2) Mohd Sharizal

Wan Sumazlee bukan dikeluarkan daripada senarai suspek kerana beliau sanggup menjadi saksi. Wan Sumazlee sanggup menjadi saksi dalam kes ini. Pada mulanya Wan Sumazlee merupakan salah seorang suspek di dalam kes ini. Bila combine soalan iaitu Wan Sumazlee dikeluarkan dari senarai suspek kerana beliau sanggup menjadi saksi. Saya tidak setuju pada mulanya nama Wan Sumazlee ada di dalam senarai suspek dan lepas beliau dikeluarkan daripada senarai suspek Wan Sumazlee sanggup menjadi saksi dalam kes ini. Semasa dia masih lagi suspek dan bukannya selepas dikeluarkan daripada senarai. Pekerjaan Wan Sumazlee adalah sebagai Penarik Kereta. Dia telah memberitahu anggota cawangan D9 Ibu Pejabat Polis Daerah Ipoh bahawa beliau mengetahui kejadian mengenai kes ini dan sanggup menjadi saksi. Dia telah memberitahu ASP Roslan dan anggota-anggotanya di cawangan D9 di bawah ASP Roslan. Dia ditahan lebih kurang 4 hingga 5 hari. Dia telah dibebaskan sepenuhnya. Saya tidak pasti sama ada beliau masih di dalam jaminan. Taraf dia telah ditukar daripada suspek kepada saksi. Dia ada beri maklumat kepada saya mengenai kes ini dan ada merakamkan percakapan daripada Wan Sumazlee. Saya tidak ingat siapa yang merakamkan percakapan beliau. Saya tidak tahu ada kereta bernombor 111 terlibat dalam kes ini. Yang saya tahu Wan Sumazlee tidak diberi immunity. Dia bersetuju untuk bekerja sama dengan pihak polis. Dia boleh pada

bila-bila masa menjadi suspek. Sekarang dia boleh menjadi suspek jika beliau tidak mahu memberi kerjasama kepada polis. Saya setuju bahawa kedudukan beliau adalah vulnerable. Dia sanggup memberikan keterangan di Mahkamah supaya kelima-lima tertuduh ini boleh disabitkan. Tiada lagi saksi-saksi lain yang berada dalam katergori Wan Sumazlee. Wan Sumazlee adalah saksi utama saya dalam kes ini. Saya tidak mengetahui secara fakta sama ada beliau bercakap benar atau tidak.

Sambung Pemeriksaan Balas oleh En. Christoper Fernando

Saya tidak menyiasat latar belakang Wan Sumazlee secara terperinci. Saya ada menyiasat latar belakang beliau secara umum sahaja. Hasil siasatan secara umum mendapati beliau bekerja sebagai seorang penarik kereta dan berkawan rapat dengan seorang suspek yang masih lagi bebas. Saya tidak tahu bahawa Wan Sumazlee pernah kerja sebagai Airport Police sebelum bekerja sebagai penarik kereta. Nama penuh kawan Wan Sumazlee yang masih bebas adalah, saya tidak ingat tetapi nama gelaran beliau ialah Tok Mat Crane. Saya tidak tahu bahawa Wan Sumazlee yang menasihatkan Tok Mat Crane supaya melarikan diri. Saya tidak pasti ada bekas anggota polis yang akan menjadi saksi di dalam kes ini. Saya tidak pernah bertemu dengan Norashimi bin Nayan. Saya hanya pernah dengar nama beliau Norashimi tetapi tidak pernah jumpa dengannya. Saya pernah dengar nama Norashimi apabila dimaklumkan oleh Wan Sumazlee bahawa Norashimi merupakan salah seorang daripada pihak yang telah pergi membuat rundingan di Restoran Ehsan di antara pihak keluarga Simati dengan pihak suspek. Saya tidak tahu bahawa Norashimi adalah kawan rapat Wan Sumazlee. Saya tidak tahu bahawa Norashimi telah didakwa di Mahkamah Majistret terhadap kes penipuan. Saya tahu Norashimi adalah seorang bekas anggota Polis. Saya tidak siasat latar belakang Norashimi. Saya tidak pasti Norashimi akan menjadi satu saksi dalam kes ini. Yang saya ingat Namanya tiada dalam senarai saksi. Saya tidak senarai saksi-saksi untuk kes ini. Saya tidak tahu Norashimi adalah saksi No.11 dalam senarai saksi di dalam kes ini. Saya telah dimaklumkan oleh pegawai atasan saya yang Norashimi telah ditemubual oleh pihak Cawangan D9, Ibu Pejabat Polis Kontingen Perak. Saya tidak ingat siapakah pegawai polis yang menemubual dengan Norashimi. Pangkat pegawai polis yang temubual dengan Norashimi, saya tidak ingat. Saya tidak tahu Norashimi ada berunding dengan pihak polis supaya Wan Sumazlee dibebaskan dan menjadi saksi polis dalam kes ini. Yang memaklumkan kepada saya ialah ASP Shazeli. Kebanyakan maklumat yang diberikan digunakan dalam kes ini adalah daripada Wan Sumazlee. Wan Sumazlee yang berkawan rapat dengan Tok Mat Crane. Lebih kurang dua atau tiga kali saya ada menemui Wan Sumazlee. Saya berjumpa Wan Sumazlee semasa beliau dalam tahanan reman. Selepas itu, saya ada berjumpa dengan beliau sekali selepas beliau dibebaskan. Saya ada jumpa dengan Wan Sumazlee pada bulan Januari 2004 dan itulah tarikh yang terakhir dan beliau ada berjanji untuk memberi keterangan terhadap kelima-lima tertuduh

dalam kes ini. Saya tidak ada remind dia mengenai memberi keterangan terhadap kelima-lima tertuduh kerana tidak perlu untuk saya mengingatkan beliau. Wan Sumazlee telah ditahan lebih kurang 5 hari. Saya bebaskan beliau selepas 5 hari. Saya di Ibu Pejabat Polis (IPD) Daerah, Ipoh pada masa itu. Saya tidak ingat selepas Wan Sumazlee dibebaskan oleh saya, beliau ditahan oleh Ibu Pejabat Kontingen (IPK) mengenai kes ini adalah dibawah pengendalian Cawangan D9, Pegawai ialah Pemangku DSP Puspanathan dalam kes ini dan sekarang beliau masih di cawangan D9. Wan Sumazlee tidak menafikan beliau terlibat di dalam kes ini. Beliau ada mengaku beliau terlibat di dalam sebahagian kecil daripada kes ini. Saya tahu nombor kereta dan jenis kereta Wan Sumazlee. Nombor Pendaftaran ialah JED 422 Proton Satria. Saya tidak tahu ada kereta nombor ACT 111 yang terlibat di dalam kes ini. Saya tidak tahu bahawa Simati ada terlibat dalam satu pergaduhan di luar disko dua hari sebelum beliau meninggal dunia dengan anak seorang VIP, orang kenamaan, bukan dengan kelima-lima tertuduh. Saya hairan bahawa kesemua kesan cap jari yang dijalankan oleh Bahagian Forensik D6 IPK Perak adalah negatif. Saya ada nampak cap-cap jari yang ditimbulkan (lifted). Saya setuju bahawa orang-orang sebenarnya yang terlibat dalam kes ini tidak dapat dikesan kerana cap-cap jari yang ditimbulkan adalah negatif. Saya setuju bahawa terdapat 11 lighter lain di bengkel Ikwan Auto tetapi hanya satu lighter yang di hantar ke Jabatan Kimia, Ipoh. Ini adalah kerana satu lighter yang dijumpai disyaki telah digunakan untuk menghidupkan api gas dapur yang dipercayai untuk memanaskan satu pembuka botol. Oleh kerana itu, satu lighter sahaja di hantar ke Jabatan Kimia. Saya tahu bahawa kesan cap jari boleh ditimbulkan daripada pemetik api (lighter). Saya setuju mungkin peluang untuk memastikan pemilik cap jari lain tidak dapat dipastikan kerana tidak mengambil pemetik api yang lain. Saya setuju mungkin satu peluang keemasan (golden opportunity) telah hilang untuk memastikan siapa yang berada di bengkel tersebut. Saya tidak setuju bahawa peluang untuk memastikan berapa orang terlibat dalam kes ini telah hilang. The chances would be brighter untuk memastikan berapa orang yang sebenar-benar terlibat dalam kes ini jika lighter-lighter yang lain dapat ditimbulkan cap jari. Saya setuju bahawa jika dapat diambil 11 lighter yang lain, ia akan membantu menentukan sama ada Wan Sumazlee bercakap benar atau tidak.

Mungkin ada orang lain di tempat tersebut dan tidak dapat ditentukan DNA daripada helaian rambut yang dijumpai. Tiada specimen darah diperolehi daripada Wan Sumazlee walaupun beliau ditangkap sebagai seorang suspek. Kesan cap jari ada diambil daripada beliau tetapi cap jari untuk siasatan tidak diperolehi untuk kes ini. Untuk kes lain tidak ambil specimen darah dan cap jari untuk analisis oleh Jabatan Kimia dari Wan Sumazlee. Yang saya ingat tiada specimen helaian rambut yang diambil dari Wan Sumazlee untuk kes ini atau kes-kes lain. Saya setuju bahawa oleh kerana specimen rambut, darah dan cap jari tidak diambil daripada Wan Sumazlee, peluang untuk menentukan Wan Sumazlee terlibat di dalam kes sebagai seorang yang memainkan peranan utama peluang terlepas

di dalam kematian Simati untuk menentukan beliau ada memainkan peranan utama dalam kematian Simati. Tidak ada tuala yang dikutip dari bengkel tersebut oleh pihak Forensik. Saya setuju bahawa terlepas kemungkinan peluang untuk menentukan siapa yang berada di bengkel tersebut pada masa kejadian pada 22.12.03. Tiada specimen darah diambil daripada Tok Mat Crane. Tiada helaian rambut atau cap jari diambil dari Tok Mat Crane untuk analisi ke Jabatan Kimia. Saya setuju satu lagi peluang telah hilang untuk memastikan sama ada Tok Mat Crane berada di situ pada 22.12.03. Oleh kerana itu, saya tidak dapat memastikan sama ada Tok Mat Crane terlibat di dalam kematian Simati.

P37 dirujuk.

Terdapat 17 barang kes yang tidak di hantar ke Jabatan Kimia untuk dianalisa. Saya tidak boleh menolak kemungkinan sebahagian daripada barang-barang kes ini dapat membantu menentukan siapa yang terlibat di dalam kes ini jikalau di hantar untuk analisis oleh Jabatan Kimia. Saya bersetuju bahawa puntong-puntong rokok boleh didapati di mana-mana tempat yang ditinggalkan oleh perokok dan ianya mudah dikutip di mana-mana. DNA profile boleh didapati daripada puntong-puntong rokok. Helaian rambut boleh didapati di mana-mana tempat dimana seseorang itu pergi. Mungkin dalam sehari, seseorang itu boleh keguguran rambut di antara 10 hingga 20 helai.

Cordoned tape yang digunakan untuk melindungi kereta JES 3778 adalah one round of tape. Saya ingat satu helai. Walaupun ada tape, ada kemungkinan orang boleh masuk berhampiran kereta itu. Kereta ini tidak ada kunci. Kalau orang hendak, boleh masuk dalam kereta itu. Saya setuju kemungkinan terdapat orang yang boleh masuk atau mengambil keluar eksibit-eksibit dari kereta tersebut atau meletak eksibit ke dalam kereta tersebut. Saya tahu kenapa ada dua pasukan Forensik yang menjalankan pemeriksaan ke atas kereta-kereta tersebut sebabnya ialah pasukan Forensik dari Maktab Cheras mempunyai peralatan dan kaedah pencarian specimen-specimen yang lebih canggih daripada pihak Forensik D6. Saya tidak ingat sama ada permohonan ada dibuat untuk meminta mereka datang untuk menjalankan pemeriksaan. Jika permohonan perlu dibuat meminta pasukan Forensik dari Maktab Cheras untuk datang melakukan pemeriksaan ia mungkin boleh dibuat oleh Ketua Bahagian Siasatan Jenayah Daerah ataupun Pegawai Penyiasat untuk satu kes itu. Bukan pasukan Forensik Maktab Cheras telah diminta untuk datang kerana tidak percaya pasukan Forensik yang ada di Ipoh. Pasukan Forensik Maktab Cheras tidak dipanggil kerana pihak Forensik D6, Ibu pejabat Polis Kontingen Perak, (IPK) telah cuba melindungi orang-orang tertentu. Bengkel itu berpagar dan padlock digunakan. Bila saya pergi ke bengkel tersebut, yang saya ingat mungkin tiada padlock pada pintu pagar tersebut di bengkel.

Pemeriksaan Semula oleh TPR En. Dusuki

1. Specimen-specimen daripada Tok Mat Crane tidak diambil memandangkan beliau masih belum dapat dikesan dan ditangkap.

2. Specimen-specimen seperti darah dan rambut tidak diambil daripada Wan Sumazlee kerana itu adalah di bawah tanggungjawab ASP Shazeli. Peranan Wan Sumazlee di dalam kes ini dilihat berdasarkan keterangan-keterangan daripada saksi dan juga dari penglibatan kereta beliau dalam kes ini. Barang-barang lain yang berada di bahagian atas Ikwan Auto tidak diambil kerana bukan semua barang-barang kes ini yang relevan dengan kejadian yang berlaku. Tindakan saya semasa menerima seluar tersebut adalah dengan melihat seluar dengan sepintas lalu (glance) dan terus membawanya kepada ASP Zuraimi untuk membuat pemeriksaan Forensik. Saya mencatat seluar itu sebagai jenama Ralph Lauren berdasarkan borang serah barang kes yang diterima. Wan Sumazlee telah menyerah diri ke cawangan D9 dan kemudiannya telah ditahan reman selam 4 – 5 hari dan dalam tempoh tahanan itu, beliau telah menceritakan pengetahuan dan penglibatan beliau dalam kes ini. Saya tidak setuju apabila penyataan ini Wan Sumazlee telah dikeluarkan dari senarai suspek setelah dia bersetuju untuk menjadi saksi kerana pihak polis tiada membuat perjanjian ini dengan Wan Sumazlee. Pada pengetahuan saya kereta JEL 3778 ini tidak dicerobohi sebelum pemeriksaan Forensik dibuat. Tahap kepercayaan kepada anggota-anggota ini adalah pada tahap yang memuaskan. Saya meminta L/Kpl Mansur untuk membuka pintu setor yang mengandungi peti sejuk yang menyimpan specimen darah-darah kepunyaan suspek-suspek. Saya boleh camkan L/Kpl Mansur

[64] In taking into consideration the evidence of ASP Suraiya binti Ahmad (PW27) this court finds that the evidence of Wan Sumazlee (PW37) suffers from infirmities and is not credible when considering that he had participated in the negotiation to extort money from the deceased's father and through out the negotiation to return the deceased to PW34. The evidence of PW37 is totally unacceptable when considering his role in the whole episode and seeing and hearing him give evidence. It is not possible to place any reliance on his testimony. Nevertheless, it cannot be disputed that there is no rule of law that the testimony of a single witness if it is cogent, reliable and believed would not be sufficient to establish the prosecution case. In other words, in an appropriate case, the conviction can be sustained even on a testimony of a single witness.

[65] The evidence of PW37 is akin to a witness who modulates his evidence to suit a particular prosecution theory in a murder case with intention to cause a conviction to the accused persons as admitted by

PW27 and such a person cannot be accepted as a reliable witness. (See *Badri v. State of Rajasthan* AIR 1976 SC 560) It is important to state that it is not the quantum of evidence but it is the quality and credibility of the witnesses that lends assurance to the court for acceptance. However, where a prosecution witnesses deliberately sets about, implicating the accused, in order to save his own skin, and to escape criminal prosecution, he/she run a grave risk of his or her evidence being rejected in toto, even if there is a strong suspicion against the accused. (See *Mahla Singh v. Emperor* AIR [1931] Lah 380). In a murder case, when a witness implicates the accused when he is faced with the necessity of exculpating himself, his evidence is open to grave suspicion (See *Nanhu Mahton v. Emperor* AIR Patna 338).

[66] Accomplice evidence of an interested witness or a witness in the position of PW37 should be treated with great suspicion and whose evidence should be evidently confirmed on every material circumstance. (See *Mohd Din v. Public Prosecutor* [1985] 2 MLJ 251). Generally it is unsafe to rely upon uncorroborated evidence of such witness. (See *Thong Hong Kee v. Public Prosecutor* [1952] 1 MLJ 110). On the other hand, the corroborative evidence must itself be credible. (See *Public Prosecutor v. Sarjeet Singh & Anor* [1994] 3 CLJ 95 HC, *Dalip Bhagwan Singh v. Public Prosecutor* [1997] 4 CLJ 645 FC). Forgetfulness and failure to recall certain events in a precise manner need not necessarily shake the credibility of a witness or render the other parts of his testimony unworthy of credit or belief where those events did not seem to be important to the witness. (See *Pie Bin Chin v. Public Prosecutor* [1985] 1 MLJ 234). Further, where witness a has been proved a liar on one or two points, it need not necessarily make the whole of his evidence in law to be rejected. (See *Khoon Chye Hin v. Public Prosecutor* [1961] MLJ 105)

[67] In the instant case, there is sufficient evidence to suggest that PW37 had in fact participated in the whole episode of the incident. PW37 did not voluntarily go to the police immediately after knowing that the deceased had died. Infact the prosecution case itself revealed that PW37 ran away to Kuala Lumpur until he was contacted by Shimi to return after which he surrendered himself to the police about 2-3 days later. Although there is no direct evidence that PW37 had been involved in the actual commission crime of murder and may not necessarily in the strict sense come within an "accomplice"; however, the presumption of unworthiness would certainly and equally attach to his evidence and on the same principle as that of an accomplice and therefore would require corroboration. (See *Harcharan Singh v. Public Prosecutor* [2005] 1 CLJ 11 CA). The need to treat PW37's evidence with caution is on a firmer ground when considering the evidence of ASP Suraiya binti Ahmad (PW27) who has in no uncertain terms admitted that:

(1) PW37 had agreed to become witness for the prosecution;

(2) PW37 agreed to give evidence against all the five accused persons;

(3) PW37 was released after five days of detention and PW37 did not deny that he was not involved in this case and rather admitted that he is involved in this case;

(4) Further, PW37 had agreed to co-operate with the police and to give evidence in court against the five accused persons so that they would be convicted;

(5) PW37 is also a prime witness in this case;

(6) There is also an admission by PW27 that PW37 can be reclassified as a suspect if he does not co-operate with the police.

[68] PW37 is clearly "a person who has thrown to the wolves his herds while presently dissassociating his friends in order to save his own skin". His evidence must be received with great caution. In the instant case, it is the considered view of this court that the evidence of PW37 requires to be corroborated and corroboration in the sense as defined in *R v. Baskerville* [1916] 2 KB 658 which there is none. In the absence of any independent corroboration of the evidence PW37, this court finds discrepancy in the testimony of the prosecution witness does not inspire confidence about the reliability of the prosecution case. "Up and down the country courts are being bedevilled by witnesses who will not speak the truth and worse than that by witnesses who tell deliberate lies. When an opportunity comes to vindicate the importance of truth, it is right that the court should mark it" (per Ashworth J. in *R v. Demaine*; The Times Nov. 20 1970).

[69] In a murder trial, the evidence of a partisan eyewitness should not be acted upon unless there is some corroboration in other evidence or materials on record. (See *Sathiyanarayan v. State of M.P* AIR 1972 SC 1309). However, testimony of a single, honest and trustworthy witness can be accepted to establish the charge of murder. What matter is quality and not quantity. (See *Jose v. State of Kerala AIR* [1973] SC 944). In other words, the evidence of PW37 must meet the twin tests of reliability and corroboration ie, the prosecution has to satisfy the court not only his evidence is in general credible, but also there is an independent corroboration in material particulars which is lacking and does not meet the twin tests. (See *Chandrasekaran & Ors v. PP* [1971] 1 MLJ 153 at p. 155). In the instant case, this court finds that the evidence of PW37 is unreliable, not credible and unsafe to accept.

[70] Where the evidence of a witness produced by the prosecution, in the instant case, PW37 cast doubt or is considered unreliable, then it is incumbent on the prosecution to produce independent evidence to connect the accused to the crime as it becomes unsafe to accept the evidence of such tainted and unreliable witness who is motivated by the assurance and the ultimatum given by the investigation agency to implicate the accused persons to the crime and that he will be used as a witness and would no longer remain as a suspect.

[71] On the other hand, even if the evidence of PW37 that the victim was carried out from the toilet at Ikhwan Auto and then placed in a room is accepted as reliable and trustworthy, there is still no presumption that the person or persons who carried the deceased was the murderer as per the charge. (See *Naresh Kumar v. State of Maharashtra* AIR 1980 SC 1160). The mere fact that the accused persons were last seen with the deceased is also not a conclusive proof of guilt of having been involved in the commission of the crime of murder unless there is strong circumstantial evidence to link the accused persons with the crime and complete the chain of evidence. (See *Inderjit Singh v. State of Punjab* AIR 1991 SC 1674; *PP v. Syed Muhamad Faysal bin Syed Ibrahim* [2004] 4 AMR 287)

[72] However, considering the evidence of PW27 and the role played by PW37 in the whole episode, this court finds that the evidence of PW37 is unsafe to accept. On the other hand, even if the evidence of PW37 is found to be safe and acceptable, it still does not connect the accused persons to make up the circumstantial evidence as required by law or to establish a *prima facie* case. (See *Looi Kow Chai v. PP* [2003] 1 CLJ 734 CA; *Balachandran v. PP* [2005] 1 CLJ 85; *DP Vijandran v. PP* [1999] 1 CLJ 691)

Scene Of The Crime

[73] The delay of about five (5) to six (6) days for the police forensic team from the Forensic Department, Cheras to arrive at the alleged scene of the crime to collect physical evidence is inexcusable and remained unexplained. There is no evidence that the building at Ikhwan Auto had been guarded by the investigating agency from the time it was discovered that the deceased was alleged to have been murdered at the said place as per the charge. Infact, PW27 had received some of the items recovered on 26 December 2003 at about 6.30pm after she went to Ikhwan Auto on 26 December 2003 but admittedly she did not collect all available items that could have possibly assisted the prosecution and this is confirmed by PW22. It would appear that the investigation in this trial was conducted in piecemeal and at intervals and that would explain why the circumstantial evidence relied on by the prosecution cannot achieve a complete chain to satisfy the test for the reception of

circumstantial evidence. The investigating agency must appreciate that the very first step that is expected of the agency to take, is to inspect the scene of the alleged crime without any delay. This action on the part of the investigation agency is important so as to collect all physical evidence or the best available evidence at the time of inspection of the scene of the crime as not only will the criminal get valuable time to put distance and obstacles between himself and the law but clues may get lost or misleading clues planted due to interference from interested or even uninterested quarters due to ignorance and carelessness.

[74] In some instances, most of the clues like fingerprint, footprint, and bloodstain might get disturbed and might even get lost with the passage of time or contaminated. Therefore, the promptness of the police investigating agency in the instant case ie, police forensic team from Cheras to arrive at the scene of the crime is of the utmost importance and any delay or serious neglect of duty would invariably lead to failure of justice. (See *State of Kerala v. N.J Samuel* AIR 1961 Ker. 99).

[75] In the instant case, the delay in collecting physical evidence at the scene of the crime and the failure of PW27 to collect all available items ie, at the place alleged in the charge has resulted in several material gaps in the prosecution case. In addition to this unsatisfactory feature, the other disturbing factor is that a cadet ASP who was a graduate in business administration and who had joined the police force for only two (2) months was instructed to carry out an investigation in such a serious crime being murder. Although PW38 was the Chief Investigating Officer, he did not take active part in the investigation but relied on PW27, an inexperience officer and to be fair to her, she was not properly and regularly guided or supervised by experienced investigators. The fashion in which the investigation was carried out by PW27 and the entire investigation is questionable and is open to several adverse inferences as to why the investigation was carried out in such most unsatisfactory and incoherent fashion. PW27 has infact admitted that there were several materials or evidence at Ikhwan Auto which were not recovered and recovery of items seems to have been carried out on a selective process. If those items were recovered, it would probably have assisted the police to identify the suspect or suspects. Further, PW27 has also admitted that some of the exhibits recovered were not even sent for scientific examination. In this instant, PW27 cannot be blamed personally as it would appear as stated above, there were not much guidance given to her by senior and experienced officers who should have led the investigation.

[76] This court is unable to appreciate when considering all these pieces of evidence which is now left hanging and the material gaps as to how and what basis the prosecution is able to submit that there is a

prima facie case on the maximum evaluation against all the five accused and has urged upon this court to direct the five accused persons to enter their defence. (See *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734; *Balachandran v. PP* [2005] 1 CLJ 85; *PP v. Saimin & Ors* [1971] 2 MLJ 16; *PP v. Mohd Radzi bin Abu Bakar* [2006] 1 CLJ 457 FC).

Investigating Officer

[77] There is another unsatisfactory feature in the instant case where ASP Shazeli bin Kahar (SP38) who is the chief investigating officer does not even know the involvement of Tok Mat Crane and yet he says he is still looking for Tok Mat Crane. He has further testified that he knows the involvement of PW37 from the investigation in this case but does not know the extent or the exact involvement of PW37. As the chief investigating officer (PW38) does not even know why Tok Mat Crane is included as one of the accused and neither does he know that Tok Mat Crane is one of the witness who was not available until the prosecution amended the charge. PW38 does not even know that Tok Mat Crane has in fact been included as one of the accused in the amended charge which was submitted by the prosecution on 19 September 2005 after 36 witnesses had testified. PW38 has further testified that he has not been informed of the inclusion of Tok Mat Crane as one of the accused in the amended charge although he is the chief investigating officer. Is this not a case where the prosecution is transgressing into the arena or function of the investigating agency because the chief investigating officer is completely in the dark as to the inclusion of Tok Mat Crane as one of the accused in the charge by the amendment. PW38 had also admitted that the investigation is not complete which arguably would mean it was premature to have charged all the five accused persons as they may not be responsible for the murder of the deceased as per the charge. PW38 under cross examination had also testified as follows:

> Siasatan tidak lengkap dari segi suspek yang terlibat belum ditangkap
>
> ... saya kata saya tidak boleh membuat keputusan untuk menolak bahawa berkemungkinan Norashimi tidak terlibat sebab keterangannya (Norashimi) dirakam oleh pegawai lain iaitu percakapan. Dalam siasatan saya, Norashimi tidak terlibat secara langsung (directly) dalam kes ini. Saya ada katakan Wan Sumazlee mungkin terlibat dalam kes ini kerana soal siasat dalam rakaman percakapan dilakukan oleh pihak-pihak lain. Saya kata saksi seperti ini bukan saksi seorang yang bebas dan mungkin ada motif kepentingan sendiri kerana ada diberi andaian perjanjian. Saya tidak tahu ada perjanjian. Pertuduhan Awal - saya tahu bahawa kesemua tertuduh dituduh dibawah seksyen 302 Kanun Keseksaan dan bersama dengan suspek yang masih bebas. Saya tahu siapa itu suspek yang masih bebas iaitu Tok Mat Crane.

[78] This court finds that the entire investigation in this murder trial is questionable and seemed to have been carried out with utter lack of seriousness and dedication and leaves much to be desired and open to several inferences which is not necessary for this court to draw or list out the same. Further, there is no evidence adduced what positive steps or action has been taken to trace Tok Mat Crane other than to include him as the person who is at large in the charge to escape the application of s. 114(g) of the Evidence Act 1950. The investigating agency ought to have taken positive steps or action to trace him as a witness and produce evidence of such positive action, but this is missing in the evidence especially when PW37 had testified that he and Tok Mat Crane have agreed to return the deceased safely.

Common Intention

[79] In order to invoke s. 34 of the Penal Code against the accused persons concert pursuant to a pre-arranged plan has to be established either by direct evidence or it can be inferred from surrounding circumstances and the criminal act complained of must have been done by one of the accused persons in the furtherance of the common intention of them all. (See *Mahbub Shah v. King-Emperor* [1945] 1A Vol. LXXII 148; *Jogineder Singh v. State of Harnya* AIR 1994 SC 461; *Pandurang v. State of Hyderabad* AIR [1955] SC 216; *Kerpal v. State of Utar Pradesh* AIR [1954] SC 706; *Lee Yoon Choy & 2 Ors v. PP* [1949] MLJ 66, *Dato' Mokhtar Hashim v. PP* [1983] 2 MLJ 232 at p. 265; *Isa bin Che Noh v. PP* [1956] MLJ 93; *Chew Cheng Lye v. Regina* [1956] MLJ 240 at 241; *Tensely v. Painter* [1969] Cri L.R 139; *R v. Serl & Ors* [1971] Crim L.R 592, *Namasiyam, Reajendran, Goh Chin Ping & Ng Ah Kiat v. PP* [1987] 2 MLJ 336 at 344, *Kamaruzaman Mat Hassan & Ors v. PP* [1997] 5 CLJ 279 at p. 286; *Muhamad Safarudin Baba v. PP* [2002] 4 CLJ 210 at 222; *PP v. Ayyavoo a/l Subramaniam & Ors* [2004] 6 MLJ 511) However, common intention can also develop on the spot itself. (See *Krishna Govind Patel v. State of Maharashtra* AIR [1963] SC 1413 and *Hari Om v. State of U.P* [1993] Cr L.J. 1383) On the other hand, it is important to observe that the presumption of the common intention or the inferences to be drawn must be subject to the same restrictions as other presumptions. It must not take the form of a bare surmise or conjecture or suspicion. There must be sufficient materials from which it can be inferred and the inference of common intention shall never be reached unless it is a necessary inference deducible from the circumstances of the case.

[80] The common intention should be inferred from the whole conduct of all the persons concerned and not only from an individual act done. As the criminal act done is not to be assumed to be in furtherance of the common intention, it follows that the common intention is not to be

inferred exclusively from the criminal act done. The criminal act done with certainty is one of the factors to be taken into consideration but should not be taken to be the sole factor. Besides proving that a certain common intention act was done, the prosecution has to prove the existence of common intention and that the common intention and the criminal act complained were done by one of the accused persons in furtherance of the common intention. These two are independent factors and one is not to be assumed or inferred exclusively from the other. (See *Bashir v. State* AIR [1953] All 668).

[81] In the instant case, the prosecution has failed to adduce evidence, first, among the five accused persons who had inflicted the fatal injury which had caused the death as found by Dr. Mohd Shafie bin Othman (PW10) the forensic expert who is the pathologist. Secondly, the prosecution has been unable to point to any of the five accused who had committed the actus rea on the date, time and place as per the amended charge in order for s. 34 of the Penal Code to be invoked. Thirdly, there is complete absence of evidence as to who among the five accused persons had caused the fatal injuries or injury to the deceased. Therefore, there are no materials before this court or any legal basis to trigger or attract s. 34 of the Penal Code. (See *Moti Gundani v. State of Orissa* [1981] Cri L.J 2342 and followed in *Makunda v. State of Orissa* 1983 Cr L.J 1025 (Ori) at p. 1038). This court is of the view that the crucial test to trigger s. 34 of the Penal Code, being committed pursuant to the pre arranged plan that is, prior meeting of the mind which may be inferred from the surrounding circumstances and conduct and that the criminal act was committed in concert pursuant to a pre arranged plan in furtherance of the common intention.

[82] In the circumstances and on the facts in the instant case, regrettably s. 34 of the Penal Code also does not seem to assist the prosecution to establish the charge against the five accused persons.

Circumstantial Evidence

[83] In cases depending largely upon circumstantial evidence, it is well settled that the court would have to be watchful and ensure conjectures and suspicion do not take the place of legal proof. The court must be satisfied that the various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. (See *Jaharlal Das v. State of Orissa* AIR [1991] SC 1388)

[84] When a case rests upon the circumstantial evidence, such evidence must satisfy three tests;

i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

ii. these circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; and the circumstances, taken cumulatively, should form a chain so complete that within all human probability the crime was committed by the accused and no one else and it should also be incapable of explanation on any other hypothesis than that of the guilt. In other words, all the links to find the guilt of the accused and the chain are complete and does not suffer from any infirmity. (See *Kishore Chand v. State of H.P* [1991] SCJ (CR) 86 *S.D Soni v. State of Gujarat* [1991] SCJ (CR) 96); *Kartar Singh & Anor v. Rex* [1952] 18 MLJ 85 at p. 86, *Abdullah bin Saad v. Public Prosecutor* [1956] 22 MLJ 92, *Idris v. Public Prosecutor* [1960] 26 MLJ 296; *Jubri v. Public Prosecutor* [1962] 28 MLJ 34, *Karam Singh v. Public Prosecutor* [1967] 2 MLJ 25; *Ng Hoong Kee v. Public Prosecutor* [1967] 1 MLJ 85, *Public Prosecutor v. Lai Pong Yuen & Ors.* [1968] 1 MLJ 12, *Muniandy & Anor. v. Public Prosecutor* [1963] 1 MLJ 179; *Eng Sin v. Public Prosecutor* [1974] 2 MLJ 168; *Dato Mokhtar bin Hashim & Anor. v. Public Prosecutor* [1983] 2 MLJ 232, *Kamis v. Public Prosecutor* [1975] 1 MLJ 46, *Lim Foo Yong v. Public Prosecutor* [1976] 2 MLJ 259, *Jayaraman & Ors. v. Public Prosecutor* [1982] 2 MLJ 273; *Chandmal & Another v. State Of Rajasthan* AIR [1976] SC 917, *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v. Public Prosecutor* [1987] 2 MLJ 336; *Gambhir v. State of Maharashtra* AIR [1982] S.C. 1157; *Ram Avtar v. The State (Delhi Administration)* AIR [1985] SC 1692, *Chandu v. State Of Madhya Pradesh* AIR [1992] SC 2302; *Kansa Behera v. State Of Orissa* AIR [1987] S.C. 1507, *Surinder Pal Jain v. Delhi Administration; Lavji Mona v. State Of Gujarat* CRI. L.J. 3148, *State Of Haryana v. Ved Prakash* AIR [1994] S.C. 468, *Kali Ram v. State Of H.P.* AIR [1973] S.C. 2773; *Chang Kim Siong v. Public Prosecutor* [1968] 1 MLJ 36; *Sunny Ang v. Public Prosecutor* [1963] 2 MLJ 195; *Percival Leonard Taylor, James Weaver and George Thomas Donovan* [1928] Cr. App. R. 20 At p. 21, *Public Prosecutor v. Sarjit Kaur a/p Najar Singh* [1998] 1 MLJ 184 at p. 193.)

[85] In the instant case, on the set of facts and circumstances, this court is not satisfied that:

a. various links in the chain of evidence produced by the prosecution have been satisfactorily proved;

b. the circumstances point to the guilt of the accused persons with reasonable definiteness;

A c. the circumstances are in proximity to the time and situation where all these conditions are fulfilled.(See *Harendar Narain Singh v. State of Bihar AIR* [1991] SC 1842)

[86] The prosecution cannot ask this court to infer that the alleged incident which took place outside the deceased's house with the view to B implicate the accused persons with the charge of murder which according to the charge is alleged to have taken place at Ikhwan Auto. The prosecution has failed to establish that the alleged assault which took place outside the deceased's house had caused the same nature of injuries suffered by the deceased to link or connect the charge of murder C against the five accused persons as per the charge and as per the finding of the pathologist, PW10. Infact, the prosecution is in fact asking this court to overstretch the court's findings on inference so as to find the alleged incident outside the deceased's house and connect the same to the murder or to show nexus of the incident which is alleged to have D taken place at Ikhwan Auto. Rightfully, the investigating agency should have carried out investigation on the fight and assault of the deceased outside the Lolly Pub about 2-3 days prior to the death of the deceased so as to eliminate any cause or link of that incident to the decaesed's death which they have failed in their duty and again leaves much to be E desired to the adequacy of the investigation.

[87] This court finds that the circumstantial evidence relied on by the prosecution is insufficient to meet the requirement in law to find a *prima facie* case against the five accused persons. In the instant case, the evidence produced by the prosecution may tend to deepen the suspicion F but surely it did not go to prove the guilt of the accused persons against the charge that may be of suspicion or grave suspicion but suspicion is not sufficient to find a *prima facie* case against the accused persons.

G **Adverse Inference**

[88] The prosecution is not bound to produce all the witnesses present or said to have seen the incident or has personal knowledge of the crime. (See *Abdullah Zawawi v. PP* [1985] 2 MLJ 16; *Teoh Hoe Chye v. PP* [1987] 1 MLJ 220 at p. 229; *Ti Chuee Hiang v. PP* [1995] 3 H CLJ 1 FC; *PP v. Chia Leong Foo* [2000] 6 MLJ 705; *PP v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233). However, material and important witnesses considered necessary by the prosecution for unfolding the prosecution case is required to be produced. The fundamental principle in our judicial system is that all relevant evidence must be produced in I a criminal trial for the court to ascertain the truth.However, if the prosecution is allowed to take shelter under the guise that is for them to decide whom they wish to call even if a particular witness is a

material witness where the prosecution had failed to call to testify or offer during the prosecution case and who may be able to throw light to ascertain the truth of the prosecution case against the accused or fill up the gaps, in which event that fundamental principle referred to above would be breached just as clearly, and with equal injury to our criminal justice system in this jurisdiction that an accused is presumed innocent until proven guilty.

[89] In the instant case, the father of the deceased, (PW34) has testified that it was En. Norashimi bin Nayan who had invited him to come to 'kedai menjual limau bali' di Jalan Gopeng and he went there together with En. Salleh and En. Norashimi. PW34 had also testified that En. Norashimi has also said that his friends will bring the deceased to the said shop. While waiting at the said shop, Norashimi received two telephone calls and when the 2nd telephone call came, Norashimi moved to a side. Later, Norashimi informed PW34 and Salleh to go to Ipoh Specialist Centre and when PW34 invited Norashimi to follow him together, Norashimi replied that he would come in another motorcar. On the way to the hospital, SP34 received a telephone call from En. Ghazali that the deceased had passed away. Immediately, on receiving the telephone call that the deceased had passed away, PW34 looked towards the back but did not find En. Norashimi following in the car and En. Norashimi was also not at the Ipoh Specialist Centre when PW34 arrived.

[90] Further, the Chief Investigating Officer, (PW38) had testified that a statement was recorded from Norashimi and that he could not rule out the possibility that Norashimi was not involved as a statement was recorded from him. Even when SP34 arrived at Restoran Ehsan at Jalan Ampang, Ipoh, Norashimi was there together with Wan Sumazlee (PW37).

[91] On 3 August 2005, during this trial Norashimi bin Nayan was in fact called by the prosecution for PW34 to identify him. Prior to 3 August 2005, the learned DPP has informed the court on 18 July 2005 that Norashimi bin Nayan, Wan Sumzalee and Salleh will be the last three witnesses who will be called to testify for the prosecution. Despite the evidence of PW34 and PW37 as to the involvement of Norashimi and coupled with the fact that there are several material gaps in the prosecution case, this court is of the view that Norashimi bin Nayan should have been called to testify or at least offered to the defence for cross examination during the prosecution case as he has been identified by PW34 and PW37 as a witness who has material information to divulge to the court as to what happened to the deceased and how the deceased's death had occurred. In the circumstances, this court is of the view that on the facts in the instant case, this is a suitable case

which attracts s. 114(g) of the Evidence Act 1950 against the prosecution and the presumption of adverse inference is drawn against the prosecution for failure to call Norashimi bin Nayan. (See *Abdullah Zawawi v. PP* [1985] 2 MLJ 16; *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1).

[92] In the instant case, there is also evidence that a person known as Mohd Shahrizal was arrested, detained, but blood samples were not taken from him on the instruction of ASP Shazeli Bin Kahar as he is not supposed to be involved. However, the name of Shahrizal has surfaced during the prosecution case and yet he was not called as a prosecution witness to testify. Further, despite the fact that PW37 was involved in the whole episode and the position he has been placed and the ultimatum that was given to him as testified by PW27, there is admission by PW27 that no blood samples were taken from him and this again is questionable and leaves much to be desired.

[93] Notwithstanding strong judicial assertions on the prerogative of the prosecution as to the choice of witnesses, it is by no means, with respect, self evident and absolute that the prerogative of the prosecution is greater than the demands of public interest and justice in facilitating the availability of all relevant materials for production in a criminal trial for the court to ascertain the truth of the charge. The public interest in discovering the truth should prevail over the prosecution's prerogative in exercising its discretion under the guise of the prosecution's prerogative as to the choice of witness they wish to call during the prosecution case.

[94] In the circumstances, this court finds that s. 114(g) of the Evidence Act 1950 has to be invoked against the prosecution for failing to call Norashimi bin Nayan as a witness during prosecution case. (See *Abdullah Zawawi v. PP* [1985] 2 MLJ 16. *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1). Further, there is also failure on the part of the investigating agency to take blood samples from Norashimi bin Nayan and PW37 who have both played an active role in the whole episode. The totality of all these blunders or flaws must necessarily be explained by the investigation agency.

Where There Is More Than One Inference

[95] One of the golden threads which run the web of the administration of criminal justice is that if there are two possible views of the evidence adduced in a case, the view or inference which is favorable to the accused should be adopted especially in cases where the guilt of the accused is sought to be established by circumstantial evidence. (See *Tai Chai Keh v. PP* [1948-1949] MLJ Supp 105 at 108; *Phoon Liat Sum v. PP* [1950] MLJ 205; *Mehtab Singh v. State of M.P*

AIR [1975] SC 274; *Ram Jag v. State of Uttar Pradesh* AIR [1974] SC 606) In the instant case, the learned DPP has conceded and informed this court at the outset of his submission at the close of the prosecution case that the prosecution was relying on circumstantial evidence and not on direct evidence to establish the charge of murder against all the five accused persons. However, it must be pointed out that in the Opening Case (encl. 15), the prosecution contended that they will prove the ingredients of the charge by direct evidence by calling eye witnesses to show the actual commission of the crime and that the deceased died at the scene of the crime ie, at Ikhwan Auto. In any event, it is now clear that the prosecution is relying on circumstantial evidence which is also insufficient to establish its case against all the five accused persons since it has failed to produce any direct evidence as originally highlighted in the Opening Case.

[96] It is also important to observe that mere suspicion or probabilities cannot be the basis of conviction. The accused 'must be' and not 'may be' guilty. (See *Shivaji Sahabrad Bobada v. State of Maharashtra* AIR [1973] Cr. L.J 1783; *PP v. Saimin & Ors* [1971] 2 MLJ 16). A case governed by circumstantial evidence cannot be based on circumstances indicating that the prosecution case is quite likely to be true or may be true but it must be true. (See *PP v. Saimin & Ors* [1971] 2 MLJ 16). In the instant case, as stated above evidence produced by the prosecution may tend to deepen suspicion but surely it does not go to prove the guilt of the accused persons. It is also important that the court must not be influenced by unfounded suspicion. (See *Prasannamayi Debi v. Baikunthanath Chattoraj* AIR [1922] Cal. 260 at 266).

[97] Suspicion however grave cannot take the place of positive proof. (See *Palvinder kaur v. State* 1952 SC 354). The sea of suspicion has no shore and the court that embarks upon it without a rudder and compass. (See *Monir's Law of Evidence*). In fact, the testimony of PW37 is clouded with grave suspicion when considering the evidence as a whole and that of the evidence of PW27 in material particulars and so far as the reliability of PW37's evidence is concerned. This court wish to stress that a stringent rule of proof in a criminal case especially on a serious charge of murder which has been framed against accused person cannot be relaxed and the court cannot act on pure surmise. This deviation from the strict standard of proof or lesser degree cannot be compromised as a supplement to a weak and disintegrated case for the prosecution.

[98] In all fairness and with such weak and most unsatisfactory evidence produced on behalf of the prosecution, this court with respect and in the least would have expected the learned DPP as an officer of the court to stand up and graciously concede on the set of facts which

A emerged in the instant case and at the close of the prosecution case that there is insufficient evidence to establish a *prima facie* case on a maximum evaluation on the charge of murder as framed against all the accused persons as required by the principle enunciated in the case of *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 CA and *Balachandran* B *v. PP* [2005] 1 CLJ 85; *PP v. Mohd Radzi bin Abu Bakar* [2006] 1 CLJ 457 FC). However, this observation should not deter the learned DPP from pursuing his case or carrying out his duty as to the best of his ability so long as whatever decision, position or stand that he has been taken is not done for the purpose to please public gallery or the C public at large or due to pressure put through media comments or reports as if that is the case, it will be a travesty of justice and a sad day for the justice system to keep all the five accused persons under remand in prison pending the outcome of the trial. In fact, it became worse and did not reflect well on the prosecution where after the 38th witness had testified, the prosecution desperately attempted to include an D additional charge of abduction to proceed together with the existing charge of murder to be tried by this court when this alleged information was already in existence and in possession of the investigating agency and the prosecution at the outset of the trial.

E **[99]** Sensational crimes have always aroused public outrage but however sensational may be the crime, the requirement of strict proof in a criminal trial can neither be compromised nor sacrificed at any cost. (See *Sia Soon Suan v. PP* [1966] 1 MLJ 116). Although the court in this jurisdiction had adhered to the adversarial procedure it had always F been astute to strike down tactics employed by parties as tactical consideration, which did not have relation to the achievement of justice, it would not be the blind man's buff or be allowed to continue such a practice to be a norm. As for the investigation, it has come to light from the evidence adduced at this trial that there has been no proper supervision or direction and lack of proper legal scrutiny of the materials G available by the investigating agency which appears to have been carried out in a unsatisfactory, muddled and mechanical fashion with possible eagerness to prosecute all the five accused persons on the charge of murder and without any proper legal foundation when considering the totality of the evidence.

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[100] It cannot be disputed that a conviction or acquittal of an accused person is dependent upon the evidence which is obtained through investigation which results in his trial. It is therefore important for the investigating agency to carry out a thorough investigation by collecting I all the material evidence to support a charge against a suspect so that the task of the prosecution will be made much convenient and easier to produce the evidence at the trial of an accused person.

[101] This court finds that it is a matter of grave concern for all the apparent blunders which had occurred during the investigation and this has to be resolved between the investigating agency and the prosecution as to who is responsible for all the flaws in the investigation and the prosecution which has resulted in the court having to acquit all the five accused persons. In fact, the prosecution cannot succumb itself to the blunders already in existence in the investigation and where the substratum of the prosecution case was no longer to be seen. It is to be observed with respect, that this is the clumsiest trial conducted by four DPPs and all the four DPPs had in fact taken active part in the prosecution and at certain instances questions raised and submissions by the DPPs were conflicting, inconsistent and appears to be competing with each other whenever rulings were sought to several objections raised during the trial.

[102] This court had also exercised extreme patience during the trial which proceeded over a period of fourty nine (49) days and three (3) days of submission. At certain times, the stands taken by the DPPs in some instances were with respect, inconsistent to the reception of the evidence. One example is the burial certificate (exh. P24) where it is expressly stated by Dr Mohd Shafie bin Othman (PW10), the forensic expert and head of forensic department Hospital Ipoh that the date and time in the column date of death as 22 December 2003 at 11a.m but this was disputed by one of the DPPs. In the first instant, why was the burial certificate tendered as evidence by the prosecution in a murder trial as there is no requirement to prove the deceased had been buried and at the same time after having produced the burial certificate, one of the DPPs chose to enter into a lengthy argument and dispute the time stated in the burial certificate in the column date of death as not referring to the time of death. It cannot be denied that it is the duty of the investigating agency to procure evidence with the view to seek the truth and upon having sufficient evidence to produce the culprit of the crime to the court of justice for trial so as to keep the society free from crime. However, where the prosecution case does not meet or falls short of the requirements in law so as to establish a *prima facie* case against the accused persons and where it leaves material gaps or doubts, then in order to ensure complete justice, it becomes the duty of this court to acquit the accused person.

[103] This court must say that the evidence produced by the prosecution is not a case which suffers from minor wear and tear situation but the evidence taken in its totality does not come anywhere even close to implicate the accused persons on the charge of murder at the date, time and place bearing in mind the admission by the prosecution that their case is depended on circumstantial evidence. This court finds that the substratum of the prosecution case itself is not intact

A and it is considered unsafe and untrustworthy when considering the consistent line of authorities which had sufficiently laid the requirement in law to meet the circumstantial evidence.

[104] This court is mindful that a life has been taken by unlawful means and the suffering of the deceased's family. However, the sacred seat of justice which I occupy demands that the court administer law 'without fear or favour, affection, or ill will or moral considerations' but within the facts and law. "This means, among other things, that a judge deciding a case should do so without any influence being brought to bear upon him to decide it one way or another by any agency outside himself. It is of course vitally important that judges should be able to decide for and against any agency of the government according to the merits of the case without any influence whatever from the said agency, except in the form of submissions put before the judge…." (See The Administration of Justice by Rt. Hon. The Lord Mackay of Clashfern) (The Hamlyn Lectures, 45th Series 1993) It is also of utmost importance that the presumption of innocence guaranteed to an accused person is maintained throughout the course of a trial until the court pronounce him guilty. (See *Attorney General v. Times Newspaper Ltd* [1973] 3 All ER 54 at p. 65)

[105] The process of the court must be used for legitimate purpose and not to please the public as a whole or the gallery or pressure placed through media so that before a charge is framed against an accused person, the prosecution must genuinely be satisfied there is strong foundation for a *prima facie* case. In this respect, it is only appropriate to observe that even in cases where an order is sought from a magistrate to detain a person who is arrested for longer than 24 hours where it appears that investigation cannot be completed within twenty-four hours, the magistrate has to be satisfied that there are grounds for believing that the accusation or information is well founded before the magistrate authorises further detention. This constitutional safeguards of the suspect is primarily to prevent any abuse or over zealous act by the investigation agency and more care is required before a person in charged in court. (See *Sitao Jholia v. Emperor* AIR [1943] Nag. 36). On the other hand, in cases where there was a *prima facie* case originally at the outset of the trial as may be found in the investigation papers but subsequently the evidence showed irreparable cracks during the course of the trial, is it not only right that the prosecution should reconsider its stand and exercise its powers to reassess the evidence and review the charge as the prosecution has the power to do so at any stage of the trial as provided by s. 254 of the CPC. (See *PP v. Mohd Amin bin Mohd Razali & Ors* [2002] 5 CLJ 281; *Long Samat & Ors v. PP* [1974] 2 MLJ 152 at 158). Faith in the administration of justice is one of the pillars on which democratic institution functions and sustains. To

establish that faith, the judges must do what is right. (See *Dr. DC Saxena v. Honorable Chief Justice of India* [1996] 5 SCC 216). It has also been recognized that judicial pronouncement must be judicial in nature and should not normally depart from sobriety, moderation and reserve. (See *State of Uttar Pradesh v. Mohammad Amin* AIR [1964] SC 703).

[106] On the totality of the circumstantial evidence and after having considered the medical and DNA evidence as a whole which is not supportive of the prosecution case, this court finds that the prosecution had failed miserably to establish a *prima facie* case against all the five accused, even with the aid of s. 34 of the Penal Code as required by law. The law requires even-handed justice from those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office. Having to adjudicate between two or more parties, such person must come to his adjudication with an independent mind, without any leaning towards one side or other in the dispute. (See *Franklin v. Minister of Town and Country Planning* [1948] AC 87). A judge must not be oppressed by the high status of a party in the dispute and instead of making a sincere attempt to ascertain the truth, shall not proceed to make an unjudicial approach to the case before him. In the courts of law there cannot be double standards – one for the highly placed and another for the rest. A judge has no concern with personalities who are the parties to the case before him but only with its merits. (See *Nand Lal Misra v. Kanhaiya Lal Misra* AIR [1960] SC 882).

[107] Accordingly and in strict accordance with the principle enunciated in *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 and *Balachandran v. PP* [2005] 1 CLJ 85, and for the reasons stated above, this court is left with no choice but to acquit and discharge all the five accused persons without calling them to enter to their defence. All the five accused persons are therefore acquitted and discharged without calling them to enter to their defence.

[108] Documentary exhibits are ordered to be retained by this court and the remaining exhibits to be returned to the police through DPP for their safekeeping until the period for appeal, if there is any, is over.